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In The
Supreme Court of the United States

EVERETT INDUSTRIES, INC.,
Petitioner,

v.

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Respondents.

On Petition For A Writ Of Certiorari To The Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

I. Did the Massachusetts Appeals Court commit an error of law when it rejected Petitioner Everett Industries, Inc.'s argument that §301 of the Labor Management Relations Act (29 U.S.C. §185 *et seq.*) ("Section 301") preempts Respondent Divyabala Patel's claim and deprives the Respondent Massachusetts Commission Against Discrimination of subject matter jurisdiction over her claim?

II. Did the Massachusetts Appeals Court commit an error of law in upholding the Respondent Massachusetts Commission Against Discrimination's award of attorney's fees because the Massachusetts Appeals Court relied upon an unconstitutional decision by the Supreme Judicial Court of Massachusetts which deprived Petitioner Everett Industries, Inc. of the due process rights afforded it by the Fourteenth Amendment to the Constitution of the United States?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Everett Industries, Inc.[1] (hereinafter referred to as "Everett") respectfully requests this Court issue a writ of certiorari to review the decision of the Massachusetts Appeals Court affirming the judgment of the Superior Court for the County of Norfolk in this case.

OPINIONS BELOW

The order issued by the Supreme Judicial Court denying Everett's application for further appellate review is not reported, but is enclosed in the Appendix to this Petition for A Writ of Certiorari (hereinafter referred to as "Appendix" or "App.") at A1. The decision of the Massachusetts Appeals Court affirming the judgment of the Massachusetts Superior Court for the County of Norfolk is not reported, but is enclosed in the Appendix at B1. The orders of the Massachusetts Superior Court for the County of Norfolk also are not reported, but are enclosed in the Appendix at C1-H4. The January 24, 1996 decision of the Hearing Officer of the Massachusetts Commission Against Discrimination is reported at 18 MDLR 26 and the September 18, 1996 decision of the Full Commission of the Massachusetts Commission Against Discrimination is reported at 18 MDLR 182. *See* App., J1 and I1.

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[1] Pursuant to this Court's Rule 29.6, Petitioner Everett Industries, Inc. makes the following corporate disclosure: The Trans Lease Group, Inc., a Massachusetts corporation, is the parent of Petitioner Everett Industries, Inc. No publicly held company owns 10% or more of the stock of either Everett Industries, Inc. or The Trans Lease Group, Inc.

BASIS FOR JURISDICTION

On June 29, 2000, the Massachusetts Appeals Court affirmed the judgment of the Massachusetts Superior Court for the County of Norfolk affirming a decision of the Full Commission of the Respondent Massachusetts Commission Against Discrimination (hereinafter referred to as the "MCAD") finding that Everett had unlawfully discriminated against Respondent Divyabala Patel (hereinafter referred to as "Patel") on the basis of her handicap in violation of Mass. Gen. L. ch. 151B. Subsequently, on September 8, 2000, the Supreme Judicial Court of Massachusetts denied Everett's application for further appellate review. Accordingly, this Court has jurisdiction under 28 U.S.C. §1257(a) to review on a writ of certiorari the judgment affirmed by the Massachusetts Appeals Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. §185(a) (section 301 of the Labor Management Relations Act, hereinafter referred to as "Section

301") provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

St. 1989, c. 722, §27 provides:

> Said second paragraph of said section 5 of said chapter 151B, as so appearing, is hereby further amended by inserting after the twenty-third sentence the following sentence:- In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant.

Pursuant to this Court's Rule 14.1(f), Mass. Gen. L. ch. 151B, §5 is set forth at App., *infra*, O1.

STATEMENT OF THE CASE

On January 24, 1996, a hearing officer of the MCAD rendered a decision in favor of Patel on her handicap discrimination claim against Everett, awarding her $25,000.00 plus interest in damages for emotional distress and denying her request for back pay. On September 18, 1996, the Full

Commission of the MCAD affirmed the decision of the Hearing Officer and also awarded Patel attorney's fees in the amount of $24,368.00 and costs in the amount of $1,303.80. Everett appealed the decision of the Full Commission of the MCAD to the Massachusetts Superior Court for the County of Norfolk. The Superior Court (Chernoff, J.) affirmed the decision of the Full Commission of the MCAD on December 3, 1997. Everett and Patel then filed cross-appeals with the Massachusetts Appeals Court. On June 29, 2000, the Massachusetts Appeals Court issued a Memorandum and Order Pursuant to Rule 1:28 affirming the judgment of the Massachusetts Superior Court for the County of Norfolk.

Everett now requests that a petition for a writ of certiorari be issued by this Court to review the decision of the Massachusetts Appeals Court. Specifically, Everett requests that this Court review the Massachusetts Appeals Court's determination that Section 301 does not preempt Patel's handicap discrimination claim and the Massachusetts Appeals Court's holding that the amendment to Mass. Gen. L. ch. 151B, §5 allowing for the recovery of attorney's fees applies retroactively to Patel's claim against Everett.

A. Procedural Background.

1. Federal Preemption.

Everett first raised the federal issue of Section 301 preemption before the Superior Court for the County of Norfolk through its motion for leave to amend its petition for judicial review of the MCAD's proceedings, filed with the Superior Court on February 28, 1997. App., *infra*, H1. The Superior Court for the County of Norfolk allowed Everett's motion to amend on March 3, 1997. App., *infra*,G1.

Subsequently, the Superior Court for the County of Norfolk concluded that Section 301 did not preempt Patel's handicap discrimination claim, ruling that

> The Hearing Officer found that Everett Industries had provided transfers in the past and refused to do so for Patel. Furthermore, the Hearing Officer found that this amounted to impermissible discrimination under state law. These findings did not require interpretation of the collective-bargaining [sic] agreement, but were based only on the testimony of witnesses, and are therefore independent of the agreement for pre-emption [sic] purposes.
>
> While it may be noted that both the Hearing Officer and the Full Commission commented that the collective-bargaining [sic] agreement does not prohibit transfers, such a finding does not require federal pre-emption [sic], as the finding was not necessary for a finding of discrimination under Massachusetts law.

Superior Court Memorandum and Order, App., *infra*, F1. The Massachusetts Appeals Court also rejected Everett's preemption argument, stating that there was "no indication in the hearing officer's findings that she interpreted the CBA" and that "the hearing officer was not required to interpret the CBA to resolve Patel's discrimination claim and the judge's ruling concerning preemption was thus correct." App., *infra*, F1.

2. Retroactive Application Of Attorney's Fees.

Everett argued that the retroactive application of the amendments to Mass. Gen. L. ch. 151B allowing the MCAD to award to a prevailing complainant reasonable attorney's fees violated Everett's due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. Everett made this argument in its reply to Patel's motion for judgment on the pleadings, filed with the Superior Court on April 23, 1997. In its Memorandum of Decision and Order, the Superior Court for Norfolk County held that the MCAD's award of attorney's fees was not based upon an error of law, stating

> G.L. c. 151B, §5 was amended in January 1990 to allow the awarding of attorney's fees to prevailing parties. Because the complaint in this case was filed in April 1988, Everett Industries argues that an award of attorney's fees is improper, being a retroactive increase of liability. While it is true that such an act will generally not be given retroactive effect without a specific provision to the contrary, the amendment in question is an exception, as has been conclusively and specifically reiterated. *School Commission [sic] of Brockton*, 423 Mass. at 16; *Fontaine v. Ebtec*, 415 Mass. 309, 320 (1993).

App., *infra*, F1. Similarly, the Massachusetts Appeals Court made short shrift of Everett's complaint that its constitutional rights had been violated by the retroactive application of the amendment to Mass. Gen. L. ch. 151B:

> Everett challenges as well the award of counsel fees as a violation of its due process rights and, to prevail, would have us overrule the Supreme Judicial Court's recent decision in *School Committee of Brockton v. Massachusetts Com'n Against Discrimination*, 423 Mass. at 16, which controls in all material respects. Suffice it to say that we will not do so. The award stands.

App., *infra*, B1.

B. Factual Background

Patel was hired by Jordan Marsh Company ("Jordan Marsh") in 1974 to work in Jordan Marsh's warehouse in North Quincy ("the warehouse"). *See* Mass. R. App. P. 18(e) Separate Volume of Exhibits And Transcripts Designated For Inclusion in The Appendix ("App.II"), 2-4.[2] She was hired into the union position of clerical processor which later became known as merchandise processor. *Ibid.* Upon being hired by Jordan Marsh in 1974, Patel became a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 25 (the "Union") and her employment was governed by the terms of the collective bargaining agreement between Jordan Marsh and the Union. App.II, 191-96.

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[2] Citations made to the "Mass. R. App. P. 18(e) Separate Volume of Exhibits And Transcripts Designated For Inclusion in The Appendix" and to the "Appendix to the Parties' Briefs" (hereinafter "App.III") in this section of the petition refer to the record on appeal before the Massachusetts Appeals Court.

On or about April 22, 1984, Jordan Marsh entered into an agreement (the "Agreement") with Everett. App., *infra*, M1; N1. Under the Agreement, Everett agreed to become the successor employer of the Jordan Marsh employees in the warehouse. *Ibid.* Everett agreed to assume the collective bargaining agreement then currently in effect, and all obligations thereunder, between Jordan Marsh and the Union. *Ibid.*; App.II, 23, 191-93, 352-61. Everett further agreed to recognize the Union as the bargaining agent of the employees in the warehouse. *Ibid.*

Patel had been a member of the Union from 1974 up to April 22, 1984, the date Everett entered into the Agreement with Jordan Marsh. App.II, 191-96. Based on the terms of the Agreement, Patel became an employee of Everett as of April 22, 1984. App.II, 352-61. The Agreement obligated Everett to continue the employment of all employees covered by the collective bargaining agreement and to maintain their terms and conditions of employment. App.II, 191-93, 352-61.

Prior to Everett becoming the successor employer of the Jordan Marsh warehouse employees, Jordan Marsh had had a practice of no light duty assignments. App.II, 170, 200. Everett did not change this practice. *Ibid.* Specifically, Everett's policy with respect to bringing injured employees back to work was to return them "to full and normal duties". *Ibid.*

After Everett became the successor employer at the warehouse, it negotiated a successor collective bargaining agreement with the Union effective from July 1, 1984 to June 30, 1987 (the "CBA"). App., *infra*, K1; App.II, 191, 196-97, 268-300. The CBA did not reference light duty. App.II, 197. Under the CBA, the only circumstances under which Everett could transfer employees or assign them to a new position, including a light duty position, was in accordance with the bid

procedure for job openings. App., *infra*, K1; App.II., pp.201-202, 277-78. The seniority provisions are found in Article V, Seniority of the CBA. Specifically, Article V, Section 4 addresses job openings and requires a bid procedure when a position becomes open or when a new job classification is added. Section 4 of the seniority article provides:

> (a) General Openings
>
> Whenever an opening occurs in any job classification, except in the case of recall following a layoff as provided in Section 3 above, and the Company determines that there is need for continuing the job, or when the Company determines that more regular employees are needed on a job, or when a new classification is added, said openings shall be posted on bulletin boards designated for such purpose for bid as provided herein for a period of three (3) working days. Regular employees shall have the opportunity for bidding for such vacant jobs and shall do so by signing the notice of vacancy where posted. The posting shall list the job vacancy, job requirement and rate of pay. The Company shall have a period of one (1) working day after the expiration of the posting period in which to consider the seniority and qualification of the bidders. The regular employees [sic] with the greatest bargaining unit seniority bidding for the job who is qualified shall be awarded the job

pursuant to his bid therefore. . .[3]

CBA, App., *infra*, K1. Neither Everett nor Jordan Marsh ever had a position in the warehouse that encompassed light duty only. App.II, 271. Indeed, the clearly defined past practice was no light duty. App.II, 170-200.

Commencing in March, 1987, Patel suffered injuries at work. App.II, 27-32, 41-46, 171-75. By August, 1987, Patel was unable to perform any of her duties. App.II, 47, 51, 52, 54, 112. While Patel was unable to work, Everett accommodated her by providing her an extended leave of absence and a job guarantee. App.II, 90-91, 171-74, 181, 184-85.

In July, 1989, Jordan Marsh terminated the Agreement with Everett. App.II, 210-11. Thereafter, all of the Everett warehouse employees, including Patel, returned to Jordan Marsh's employ. At that point, Everett was no longer the employer of Patel or any other warehouse employees. App.II, 210-12. At no point during Everett's employment relationship with the warehouse employees did Everett terminate Patel's

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[3] Identical seniority provisions appear in the successor contract negotiated between Everett and the Union for the period extending from July 1, 1987 through June 30, 1990, notwithstanding the fact that the provisions have a slightly different numbering system. The successor agreement, captioned Agreement By and Between Everett Industries, Inc. and Teamsters Local Union Nos. 25 & 82 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is set forth in the Appendix, *infra*, L1. The verbatim provision set forth above appears in Section 5.8 General Openings of Article 5.0 Seniority. *Ibid.*

employment. App. III, 35. Patel remained on the seniority list of employees returned to Jordan Marsh employment.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Massachusetts Appeals Court's Misapplication Of This Court's Well-Settled Interpretation Of The Preemptive Effect Of 29 U.S.C. §185 Conflicts With Relevant Decisions Of This Court.

The Court should issue a writ of certiorari in this case because the decision of the Massachusetts Appeals Court to which Everett seeks to direct a writ of certiorari decides the important federal question of preemption of a state handicap discrimination claim by Section 301 of the Labor Management Relations Act in a manner that conflicts with this Court's interpretation of the preemptive effect of Section 301.

Everett seeks review of the Massachusetts Appeals Court's rejection of its argument that the MCAD lacks subject matter jurisdiction over Patel's claim because it is preempted by Section 301. Section 301 preempts state law claims which require interpretation of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988) (§301 preempts state law claim if claim requires interpretation of collective bargaining agreement); *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985)(claim preempted if inextricably intertwined with consideration of terms of labor contract); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), *cert. denied* 490 U.S. 1107, 104

L. Ed. 2d 1021, 109 S. Ct. 3158 (1989) (§301 preempts privacy violation claim); *Jones v. Cassens Trans.*, 982 F.2d 983, 985 (6th Cir. 1993) (§301 preempts state law sex discrimination claim); *Cf. O'Brien v. Consol. Rail Corp.*, 972 F.2d 1 (1st Cir. 1992), *cert. denied* 506 U.S. 1054, 122 L. Ed. 2d 134, 113 S. Ct. 980 (1993) (Railway Labor Act preempts state handicap discrimination claim because collective bargaining agreement must be interpreted to resolve claim). Section 301 statutory preemption exists so that disputes involving collective bargaining agreements may be resolved throughout the nation in accordance with uniform principles of federal labor law. *Lingle*, *supra*, at 405-06.

In *Flibotte, et al. v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 26 (1st Cir. 1998), *cert. denied* 118 S. Ct. 1806 (1998), the First Circuit stated that "[§301] labor-law preemption casts a relatively wide net," and set forth the test for preemption:

> In practice, this test boils down to whether the asserted state law claim plausibly can be said to depend upon the meaning of one or more provisions within the collective bargaining agreement.

Ibid.; *see also BIW Deceived, et al. v. Local S6, Indus. Union of Marine and Shipbuilding Workers of America*, 132 F.3d 824, 829-30 (1st Cir. 1998) (citing *Flibotte* test for §301 preemption). It is well-settled that past practices, even where they are not set forth in the agreement, are considered part of a collective bargaining agreement. *See United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

The Court should grant Everett's petition for a writ of certiorari because both the decision by the Hearing Officer and the decision by the Full Commission reveal that the Hearing Officer interpreted several portions of the CBA.

> At all relevant times, the terms of [Patel's] employment were governed by collective bargaining agreements negotiated by her union, the Teamsters and [Everett]. (Joint Exhibits 1 and 2). These collective bargaining agreements contain no provisions either allowing or prohibiting changes in work assignment to reasonably accommodate employees with handicaps. The agreements contain provisions for bidding on job openings in a particular job classification and permit the employer to transfer employees from one job classification to another on a temporary basis. (Joint Exhibit 1)[.] The agreements do not address transfers of employees within the same job classification to different areas of the facility or to different locations within the same area.

Decision of the Hearing Officer, Finding of Fact No. 27. App., *infra*, J1.

> We also hold that the collective bargaining agreement in this case did not erase nor displace Complainant's statutory rights. The agreement did not explicitly or implicitly bar the requested accommodation. This is in contrast to those situations where the

> agreement either explicitly or implicitly bars the accommodation. In those situations an employer may assert the agreement as a defense: the accommodation in those instances may impose an undue hardship on the employer since it may require the employer to violate the agreement. This is not the case here. [citations omitted].

Decision of the Full Commission. App., *infra*, 11. Justice and the public interest require the Court to correct this unwarranted intrusion by the MCAD into the field of federal labor law.

In this case, the CBA must be interpreted in order to determine whether Everett unlawfully failed to provide Patel a reasonable accommodation. Whether Everett was permitted to grant Patel the accommodation she requested - light duty - is a question which only can be answered by construing the relevant provisions of the CBA and past practice. The Massachusetts Appeals Court rejected this argument and found that the Hearing Officer's "findings demonstrate that she merely perused the [CBA] to determine whether the CBA made mention of reasonable accommodations for employees with handicaps or light duty assignments within job classifications". App., *infra*, B1. Like the MCAD, the Appeals Court seemingly concluded that because the CBA was silent on the subject of "reasonable accommodation" or "light duty", the type of reasonable accommodation requested by Patel in this case - light duty - was permissible. The fatal flaw here is that such a conclusion not only ignores the seniority provision set forth above, but it tramples the seniority rights of more senior workers who under the CBA had the absolute right to bid on the light duty job desired by

Patel.

Furthermore, even assuming *arguendo* that Section 301 allows state agencies to "peruse" collective bargaining agreements in connection with state law claims, the CBA's silence on reasonable accommodation and light duty assignments does not mean that Patel's claims may be resolved without interpreting the CBA. In fact, in light of the CBA's silence on reasonable accommodation and light duty assignment, federal labor law requires further interpretation of the CBA, including past practice, to determine whether the CBA would permit Everett to grant Patel's request for light duty.

The Appeals Court upholds the MCAD's facile conclusion that because the CBA does not contain the terms "reasonable accommodation" or "light duty", then such accommodation must be permissible. Again, assuming *arguendo* that the CBA's seniority provisions do not prohibit the accommodation requested by Patel, and it is Everett's position that they do, the contract interpretation inquiry is not complete. It is clear that silence on taking a particular action does not constitute permission to engage in that action. *Central Illinois Public Service Company*, 139 NLRB 1407 (1962), *enf'd NLRB v. Central Illinois Public Service Co.*, 324 F.2d 916 (7th Cir. 1963). It is equally clear that in the absence of applicable contractual provisions or where contract provisions can be construed to be ambiguous, federal labor law requires examination of past practice. *Champion Boxed Beef Company v. Local No. 7, UFCW*, 24 F.3d 86, 88-89 (10th Cir. 1994); *Manville Forest Products Corporation v. United Paperworkers Int'l Union, Local 364*, 831 F.2d 72, 75-76 (5th Cir. 1987).

In this case, regardless of the conclusion ultimately reached, the fact-finder had to construe the CBA. The first

inquiry is whether the contract addressed the question of establishment of light duty as an accommodation. If the terms addressing the issue of light duty are ambiguous or non-existent, the second inquiry is whether the question is dictated by past practice. These two inquiries, *i.e.*, interpretation of the CBA and, if necessary, scrutiny of past practice, are a necessary threshold to a determination on the question of discrimination. For only if the CBA (including past practice) permitted the creation of light duty, and Everett failed to accommodate Patel with light duty based on discriminatory motives, could there have been a finding of discrimination. Clearly, any conclusion regarding discrimination turns on the interpretation of the CBA.

The issue of contract silence warrants emphasis. Again, the Appeals Court and the MCAD concluded that because the CBA was silent on whether light duty can be provided or whether Everett can carve out a new lighter job for Patel, then the accommodation sought must be permissible. This flies in the face of a basic federal labor law premise that prohibits employers from making unilateral changes regarding the terms and conditions of employment. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 115 L. Ed. 2d 177, 111 S. Ct. 2215 (1991). The rationale for this fundamental rule of federal labor law has been articulated as follows:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right to self-

> organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

NLRB v. McClatchy Newspapers, 964 F.2d 1153,1162 (D.C. Cir. 1992) (*quoting May Department Stores Co. v. NLRB*, 326 U.S. 376, 385, 90 L. Ed. 145, 66 S. Ct. 203 (1945).

It cannot be disputed that what Patel sought was a change in the terms and conditions of her employment. Accordingly, in assessing the reasonableness of Patel's request, the Hearing Officer had to interpret the CBA – *i.e.*, the express provisions and past practice – to determine if the change sought by Patel was either permitted or prohibited. Indeed, the Hearing Officer engaged in such a review when she "perused" the CBA and characterized various provisions in Finding of Fact No. 27. *See* App., *infra*, J1. Accordingly, the Hearing Officer clearly interpreted the CBA and Patel's handicap discrimination claim thus is preempted by Section 301.

Moreover, consider the inescapable implication of the conclusion that light duty or creation of a new lighter duty job within the classification is permissible because the CBA does not contain provisions prohibiting such actions: where the CBA is silent on a particular topic, employer action is permissible. From such a conclusion, it logically follows, for example, that because the CBA does not prohibit an employer from awarding wage increases over and above those which have been negotiated, then it is permissible for an employer to unilaterally increase wages. Such a finding also leads to the conclusion that where a CBA is silent on a particular action, an assessment of whether such an action is permissible does not require an interpretation of the CBA and would never be preempted. It cannot be disputed that even absent

contract provisions on the subject, an employer cannot unilaterally increase pay - or award a new light duty position. If this was the case, the entire collective bargaining process would be undermined and further, employers and unions would be required to delineate in collective bargaining agreements every proscribed action.

As described above, in this case, the accommodation requested by Patel - light duty - required an interpretation of the seniority provision of the CBA. Such an interpretation compels federal preemption.

II. Review Is Warranted Because The Retroactive Application Of The Attorney's Fees Provision Of Mass. Gen. L. Ch. 151B Deprived Everett Of The Due Process Rights Afforded Everett By The Fourteenth Amendment To The Constitution Of The United States.

The decision of the Massachusetts Appeals Court affirming the award of attorney's fees pursuant to an amendment to state law violates Everett's due process rights under the Fourteenth Amendment to the Constitution of the United States by giving retrospective effect to a statutory amendment. This action by the Massachusetts Appeals Court conflicts with the principle of statutory interpretation long applied by this Court: a statute is deemed to be effective only for the future unless contrary intent appears. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988).

Patel filed a complaint with the MCAD on or about April 21, 1988 alleging that Everett had unlawfully discriminated against her in violation of Mass. Gen. L. ch

151B. On the date that Patel filed the complaint with the MCAD, Mass. Gen. L. ch. 151B did not provide for the recovery of attorney's fees by a prevailing party. On January 13, 1990, before the MCAD had taken any final action on Patel's complaint, the Great and General Court of Massachusetts amended Mass. Gen. L. ch. 151B, §5 to allow prevailing parties to recover attorney's fees. St. 1989, c. 722, §27. The amendment did not include language making its application retroactive. Notwithstanding the absence of any clear legislative intent to apply this amendment retrospectively, both the MCAD and the Massachusetts courts awarded attorney's fees to Patel pursuant to Mass. Gen. L. ch. 151B, §5 in connection with her action against Everett.

As this Court frequently has noted, there is a time-honored presumption against retroactive legislation that is deeply rooted in the Court's jurisprudence. *See Hughes Aircraft Company v. United States*, 520 U.S. 939, 946, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997); *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990) (SCALIA, J., concurring). Thus, in order to determine whether a new statute should be applied to a pending case, this Court has announced that it first must ask whether the legislature has expressly prescribed the statute's proper reach. *Martin v. Everett Hadix*, 527 U.S. 343, 352, 144 L. Ed. 2d 347, 119 S. Ct. 1998 (1999) (citing *Landgraf*, 511 U.S. at 280). If there is no legislative directive on the temporal reach of the statute, the Court then must determine whether the application of the conduct at issue would result in retroactive effect. *Ibid.* If so, the Court presumes that the statute does not apply to that conduct. *Ibid.*

Nothing in the 1990 amendment to Mass. Gen. L. ch. 151B, §5 evidences a clear intent by the legislature that it be applied retrospectively. Thus, if the 1990 amendment has a retroactive effect, under this Court's analysis in *Landgraf*, 511 U.S. at 280, the Court should presume that the amendment will not apply to this case. This Court frequently has cited with approval Justice Story's "influential definition" of impermissibly retroactive legislation:

> Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Hughes Aircraft Company, 520 U.S. at 947 (citing *Landgraf*, 511 U.S. at 269 quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767, 2 Gall. 105 (1814)(Story, J.)). Here, the 1990 amendment to Mass. Gen. L. ch. 151B, §5 created a new obligation with respect to a defendant who was found by the MCAD to have engaged in unlawful employment discrimination. That amendment provided the MCAD, for the first time, with the authority to award attorney's fees to a plaintiff prevailing on an employment discrimination claim. Thus, the scenario presented in this case is similar to that presented in *Langraf*, where this Court held that an increase in monetary liability could not be applied retroactively even though the "normative scope of Title VII's [of the 1964 Civil Rights Act] prohibition on workplace discrimination" was not altered. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303, 128 L. Ed. 2d 274, 114 S. Ct. 1510 (1994). Additionally, the scenarios presented

in this case is distinct from those presented in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 40 L. Ed. 2d. 476, 94 S. Ct. 2006 and *Martin* because in both of those cases attorney's fees were already available.

Here, before deciding to defend against Patel's claims in 1988, Everett assessed the costs to litigate: *its costs*, not Patel's, because under the law attorney's fees were not available before the MCAD. The availability of attorney's fees before the MCAD would have dramatically changed the cost-benefit analysis conducted by Everett at the outset of this litigation. The decision of the Massachusetts Appeals Court ignores the effect of the attorney's fees provision on the cost-benefit analysis conducted by Everett before the amendment became effective. That such a sea change in available remedies necessarily must effect a litigant's cost-benefit analysis is obviated by the effect of that change in this case: the emotional distress damages awarded to Patel were $25,000, while the attorney's fees awarded by the MCAD through the retrospective application of the amended Mass. Gen. L. ch. 151B were $24,368. App., *infra*, I1; J1. Thus, the attorney's fees awarded by the MCAD in this case doubled Everett's exposure.

Everett's due process rights were further impaired by its reasonable reliance on the well-settled presumption against retroactive application of statutes long-espoused by the Massachusetts courts. Absent an express legislative directive, the Supreme Judicial Court of Massachusetts applies

> the general rule of interpretation. . .that all statutes are prospective in their operation, unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when

> considered in the light of the subject matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations.

City Council of Waltham v. Vinciullo, 364 Mass. 624, 625, 307 N.E.2d 316 (Mass. 1974) (quoting *Hanscom v. Malden & Melrose Gas Light Company*, 220 Mass. 1, 3, 107 N.E. 426 (Mass. 1914)). In fact, both before and after the 1990 amendment to Mass. Gen. L. ch. 151B, §5, Massachusetts courts held that legislation which provides additional damages in the form of attorney's fees may not be given retroactive effect unless expressly provided for in the amendment. *Austin v. Boston University*, 372 Mass. 654, 657, 363 N.E.2d 515 (Mass. 1977) (prohibiting retroactive application of amendment allowing for payment of attorney's fees); *Blood v. Edgar's, Inc.*, 36 Mass. App. Ct. 402, 408-410, 632 N.E.2d 419 (Mass. App. Ct. 1994) (same). *See also Fontaine v. Ebtec Corporation*, 415 Mass. 309, 320-21, 307 N.E.2d 316 (Mass. 1993).

Consistent with its longstanding presumption against the retrospective application of statutory amendments, the Supreme Judicial Court of Massachusetts held that other damage remedies added to Chapter 151B by the same 1990 amendment that added the attorney's fees provision to Mass. Gen. L. ch. 151B, §5 could not be given retroactive application. *Fontaine v. Ebtec Corporation*, 415 Mass. at 320-21. *Fontaine* did not address the retroactive application of attorneys' fees.[4]

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[4] In a footnote, the *Fontaine* court recognized, but did not decide, that to the extent the amendment provided only an alternative forum for dispute it may have retroactive application. But that was not the issue before the court and, furthermore, the

Following its decision in *Fontaine*, the Supreme Judicial Court of Massachusetts inexplicably diverted from its long line of jurisprudence disfavoring retroactive application of statutes in *School Committee of Brockton v. MCAD*, 423 Mass. 7, 19, 666 N.E.2d 468 (Mass. 1996). The *School Committee of Brockton* decision is not only inconsistent with *Fontaine*, but exceeds the powers and functions reserved to the judiciary. In the *School Committee of Brockton* case, the Supreme Judicial Court of Massachusetts impermissibly intruded upon the domain of the Great and General Court by judicially legislating a statutory provision which simply does not exist and thus giving retroactive effect to the attorney's fees amendment to Mass. Gen. L. ch. 151B, §5. Such overstepping violates the due process provisions of the Fourteenth Amendment to the Constitution of the United States.

This Court has warned that due to the presumption against the retroactive operation of statutes, courts should not "presume" legislative intent to act retroactively. *Rivers*, 511 U.S. at 311. Where, as in this case, there is no evidence of legislative intent that a statute be applied to cases already pending at the time the statute was enacted, courts should not infer such intent. The retroactive application of statutes absent clear indication of legislative intent for such retroactivity constitutes an unwarranted and impermissible intrusion upon the due process rights guaranteed by the Fourteenth Amendment to the Constitution to the United States.

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attorney's fee amendment to Chapter 151B, section 5 *did not* merely create an alternative forum for resolving Chapter 151B claims.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Counsel for Petitioner

December 7, 2000

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Supreme Judicial Court for
the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Ann M. O'Neill, Esquire
Murphy, Hesse, Toomey & Lehane
44 Farnsworth St, 2nd Floor
Boston, MA 02110

RE: Docket No. FAR-11502

EVERETT INDUSTRIES, INC.
vs.
MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Susan Mellen, Clerk

Dated: September 8, 2000

To: Ann M. O'Neill, Esquire
Jane K. Alper, Esquire
Gregory A. Manousos, Esquire

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
CLERK'S OFFICE
1500 New Court House
Boston, Massachusetts 02018
(617) 725-8106

June 29, 2000

Ann M. O'Neill, Esquire
Murphy, Hesse, Toomey & Lehane
44 Farnsworth St, 2nd Floor
Boston, MA 02110

RE: No. 1998-P-0960

EVERETT INDUSTRIES, INC.
vs.
MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another

NOTICE OF DOCKET ENTRY

Please take note that on June 29, 2000, the following entry was made on docket of the above-referenced case:

Decision: Rule 1:28 (K GB LK). Notice. (See image on file.)

Judgment Affirmed.

Very truly yours,

The Clerk's Office

Dated: June 29, 2000

To: Ann M. O'Neill, Esquire
Jane K. Alper, Esquire
Gregory A. Manousos, Esquire

COMMONWEALTH OF MASSACHUSETTS

Appeals Court of the Commonwealth
At Boston,

In the case no. 98-P-960

EVERETT INDUSTRIES, INC.

vs.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another.

Pending in the Superior

Court for the County of Norfolk

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

/s/ Ashley Ahear, Clerk
Date June 29, 2000.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

98-P-960

EVERETT INDUSTRIES, INC.

vs.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A hearing officer for the Massachusetts Commission Against Discrimination (MCAD) concluded that Everett Industries, Inc. (Everett) had discriminated against its employee, Divyabala Patel (Patel), on the basis of her handicap. The officer found that Everett failed to make the reasonable accommodation of temporarily assigning Patel to lighter duty within her job function while her work-related injuries healed. Patel was awarded damages for emotional distress and interest on those damages, but her request for back pay was denied. The Full Commission affirmed the hearing officer's findings and also awarded Patel retroactive attorney's fees and costs. Everett exercised its right to judicial review, and a Superior Court judge affirmed the decision of the Full Commission. Everett and Patel have filed cross-appeals from the judge's decision.

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[1]Divyabala Patel.

The applicable scope of review is set forth in the margin.[2] We defer to the fact-finding function of the Commission where substantial evidence exists to support its findings and there is no other error of law. See G. L. c. 151B, § 6; *Ramsdell v. Western Massachusetts Bus Lines, Inc.*, 415 Mass. 673, 677 (1993). We affirm the judgment of the Superior Court, as the hearing officer made no errors of law and her factual findings were supported by substantial evidence.

Background. We briefly set forth the basic facts found by the hearing officer in order to give context to the issues presented. Additional facts will be recited when necessary to address the parties' arguments.

In 1987, when Patel suffered her disabilities, she held the position of "merchandise processor" in a department store distribution center operated by Everett. Patel and the other merchandise processors assigned to

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[2]The scope of review for MCAD decisions is set forth in c. 30A, § 14(7), the Administrative Procedure Act. See G.L. c. 151B, § 6. Chapter 30A, § 14(7) provides, in relevant part, that the court may set aside or modify the decision of an administrative agency "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . c) Based upon an error of law;. . . (e) Unsupported by substantial evidence; (f) Unwarranted by facts found by the court on the record. . .; or (g) Arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law." Substantial evidence is defined by statute as "such evidence as a reasonable mind might accept as adequate to support a conclusion." See G. L. c. 30A, § 1(6); *School Committee of Brockton v. Massachusetts Com'n Against Discrimination*, 423 Mass. 7, 11 (1996).

"Area D" at the center had three primary duties: 1) the nonautomatic conveyor belt, where processors placed price tags on smaller items of merchandise; 2) "floor work," which involved the processing of boxes of goods that were too large to fit on the conveyer belt; and 3) china, which involved the processing of heavy boxes of china.[3]

In early March of 1987, Patel was performing floor work when she injured her left hand and wrist. Patel was ordered by her physicians to remain out of work; she returned to work in early April, 1987.[4] When Patel returned to work, she gave the warehouse manager a doctor's note advising that she could not use her left hand and also informed the Area D supervisor of the same. However, Patel was assigned to heavy floor work rather than the "light duty" she requested.

After two weeks, Patel stopped working due to the pain in and limitations of her injured hand. When she returned to work at the end of April, she gave the warehouse manager another doctor's note and informed him that her injury still had not healed completely. She requested a lighter duty assignment to the conveyor belt but was again instead assigned first to floor work and then to pack china. Patel testified that the Area D supervisor told her to stay home if she did not feel well.

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[3]At that time, there were thirty to thirty-five people working on the D side; approximately fifteen to twenty individuals were on the conveyor belt, three individuals were in china, and the rest were on floor work.

[4]Patel eventually was diagnosed with a hairline fracture and a bone out of place in her left wrist.

In late May of 1987, Patel injured her right hand while packing china and was unable to return to work until June 3. Upon her return, she informed the supervisor and also her crew leader for Area D that she could not perform heavy work. Again, Patel was assigned to work on the floor and told to stay home if she did not feel well.[5]

On June 9, Patel fell after being struck from behind by a skid that slipped off a track. She injured her right ankle and left hand. When Patel returned to work at the end of July, she was unable to perform the heavy work assignments due to severe pain in her shoulder, hand and leg. She then worked for approximately one week but did not return to work after early August.[6]

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[5]When Patel was asked by her counsel why she did not stay home, Patel testified that "[t]he doctor say you go back, and I want to go back desperately. I don't want to stay home. I need a job there." Patel also testified that at various times she held a second job because her husband had suffered an injury and she was then her family's only source of income.

[6]Dr. Barry, one of Patel's treating physicians, testified that Patel had been under his care since April, 1989. He testified that, in his opinion, when Patel performed the heavy work after the initial injuries to her left hand and wrist, she compensated by using her upper arm more, which caused her pain in her left arm and shoulder. Dr. Barry also testified that the second accident aggravated Patel's condition and caused the subsequently diagnosed adhesive capsulitis. Adhesive capsulitis, or "frozen shoulder" is defined as an inflammation of the capsule around the shoulder joint. The third accident further worsened her prior injuries. The hearing officer also noted that Patel is "extremely diminutive in size and stature and appears to be somewhat frail."

Representatives from Everett's management met with Patel on numerous occasions at her home to discuss her return to work. Patel informed them that she wished to return and to be assigned lighter work within her area, or if necessary, to be reassigned to another department until she was able to resume the heavy duties. Everett's management informed her that, if she returned, she would be required to perform the same heavy work as before her injuries and not to expect any kind of transfers or light duty work.[7]

Patel's physical problems increased over time and by April, 1990, her treating physician found her to be totally disabled from performing the type of work she did prior to her injuries. Patel never returned to her position at Everett. We turn now to the parties' arguments.

1) **Federal preemption**. As a threshold matter, Everett argues that the judge erred in ruling that Patel's state handicap discrimination claim was not preempted by § 301 of the federal Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a).[8] The distribution center

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[7]Dr. Barry testified that, in his opinion, Patel could have performed sedentary work that did not require much use of her left arm.

[8]Section 301 of the LMRA states in pertinent part that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . ." 29 U.S.C. § 185(a). Over the years, this statutory language has formed the basis for a complex preemption jurisprudence in federal labor law. See *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 10 (1st Cir. 1999). Although Everett failed to

employees, including Patel, are union members and their employment is governed by a collective-bargaining agreement (CBA). The CBA provides that employees could only be reassigned or transferred to a new distribution center job in accordance with certain enumerated bid and seniority provisions for job openings. The MCAD hearing officer found no mention in the CBA of accommodations for handicapped or injured employees. Nor was mention made there of temporary transfers of employees within the same job classification to different job classifications, different areas of the facility or to different locations within the same area.

The "basic test" for determining whether § 301 preempts a state-law claim is whether a court, "in passing upon the claim, would be required to interpret the collective bargaining agreement." *Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 26 (1st Cir. 1997), citing to *Lingle v. Norge Div. of Magic Chef, Inc.* 486 U.S. 399, 405-406 (1988). Specifically, a state-law tort action "may be preempted by § 301 if the duty to the employee of which the tort is a violation is created by a collective bargaining agreement and without existence independent of the agreement . . . [or] a claim so qualifies if its resolution arguably hinges upon an interpretation of the collective bargaining agreement." *Flibotte*, 131 F.3d at 26, citing to *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990)

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raise the issue of preemption until it appealed the MCAD decision to the Superior Court, the judge addressed the issue, observing that the parties cannot waive a jurisdictional flaw. See T*ardanico v. Aetna Life & Cas. Co.*, 41 Mass. App. Ct. 443, 444 (1996).

and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

Everett focuses on the "interpretation" rubric of preemption, contending that the hearing officer interpreted the CBA in order to resolve Patel's discrimination claim and that, even if the officer did not do so, Patel's requests for light duty required the interpretation of the CBA. Everett is incorrect on both counts.

There is no indication in the hearing officer's findings that she interpreted the CBA. Instead, the officer's findings demonstrate that she merely perused the agreement to determine whether the CBA made mention of reasonable accommodations for employees with handicaps or temporary assignments within job classifications.[9] Everett itself admits that the CBA is "silent" on these points. Robert Iantosca, the vice-president of Everett's parent company and the one who negotiated the CBA, testified that the CBA was silent on those issues. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective- bargaining agreement will be consulted in the course of state-law litigation plainly does not require the

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[9]The hearing officer's findings state that "'[t]hese collective bargaining agreements contain no provisions either allowing or prohibiting changes in work assignments to reasonably accommodate employees with handicaps. The agreements contain provisions for bidding on job openings in a particular job classification and permit the employer to transfer employees from one job classification to another on a temporary basis . . . The agreements do not address transfers of employees within the same job classification to different areas of the facility or to different locations within the same area."

claim to be extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994) (citation omitted).

Turning to Everett's second argument, Everett insists that Patel requested a "newly created light duty position" when she asked to be temporarily assigned to light duty while her work-related injuries resolved. Under the CBA, management cannot unilaterally transfer employees to new positions without thereby violating the job-bidding procedures in the CBA. Everett argues that the issue of whether Everett discriminated against Patel by refusing to assign her to lighter work is "inextricably intertwined" with the CBA's seniority provision. Therefore, Everett argues, the rights and obligations of the parties to the CBA, specifically the employee seniority clauses, must be construed in order to evaluate its conduct.

The flaw in Everett's reasoning is that Patel did not request a new position when she returned to work after sustaining injury. She simply asked to be assigned temporarily to lighter duty, the conveyor belt, within the job of merchandise processor. She neither requested a transfer to a different job nor a permanent assignment to light duty work. As discussed above, the hearing officer found that the CBA had no impact on her request. There must be a "real interpretive dispute" to preempt state law claims. See *Lydon*, 175 F.3d at 10 (citation omitted) (emphasis included). The hearing officer was not required to interpret the CBA to resolve Patel's discrimination claim and the judge's ruling concerning preemption was thus correct.

2) **Evidence of employee transfers**. Since the CBA included no mention of temporary light duty assignments, the MCAD hearing officer heard testimony as to whether the distribution center supervisors in fact permitted

employees to be assigned lighter duties on a temporary basis. Everett asserts that neither it nor the union's predecessor employer had engaged in such a practice and contends that Patel's testimony to the contrary was unreliable. It argues that the officer's finding that such assignments were common was therefore not based on substantial evidence.

Everett's contention rests on its characterization of Patel's testimony as unreliable hearsay and its observation that she presented no other witnesses to substantiate her claims. In administrative proceedings, however, "hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value." *School Committee of Brockton v. Massachusetts Com'n Against Discrimination*, 423 Mass. 7, 15 (1996); see also G. L. c. 151B, § 5 (MCAD not bound by the strict rules of evidence prevailing in courts).

Patel's testimony was probative of whether Everett failed to accommodate her handicap. Patel had worked at the distribution center since 1974. She testified that she witnessed and was informed of specific incidents of supervisors assigning merchandise processors to both light duty and different duties, that these assignments were made because of health problems and personality conflicts, and were both temporary and permanent assignments.[10] She

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[10]Patel testified that a processor named Joannie Ryberg was taken off floor work and transferred to the conveyor belt after complaining of back pain. Another woman named Elaine was assigned to the conveyor belt because she was tall and disliked constantly bending over to lift boxes. Lee Buckley was also transferred to another side because of health

provided employee and supervisor names, the reason for each assignment, and the area or duty to which each employee was reassigned. Everett had the opportunity to cross-examine Patel and present its own evidence to the contrary.[11] Nothing in the record suggests that Patel's testimony in this regard was unreliable.

Everett makes much of the contrary testimony by its own witnesses. Robert Iantosca, a vice president of Everett's parent company who negotiated the CBA, and Paul Meleedy, one of the managers who visited Patel at her home, both testified that there was no practice of light duty assignments at all. Raymond Taylor, a former distribution

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problems. Joanne Sherman was transferred from one side of the distribution center to another and told Patel it was because of issues with her supervisor. Janet Hunter was transferred from Patel's side to another side after quarreling with a coworker and supervisor, which Patel observed. Patel testified that other transfers had occurred but that she was unsure of the reasons for them, and that she had never heard anyone referring to "bidding" on a job.

[11]Everett attempts to discredit Patel by arguing that Patel was using her injury to transfer to a new job, pointing to a union grievance that Patel filed in 1986. In that grievance, Patel stated that her supervisor and her co-workers harassed her and singled her out for harder work. The distribution center manager, Raymond Taylor, testified that he informed Patel that she could only be transferred pursuant to the procedures outlined in the CBA. Everett ignores that Patel sustained a work-related injury a year after filing this grievance. Patel's grievance, moreover, supports her testimony that certain employees were assigned to more favorable tasks at the supervisor's discretion.

center manager who testified on behalf of Everett, also testified that there was no light duty policy.

Taylor, however, also made numerous statements that undercut Everett's position in this regard. Taylor testified that supervisors had the authority and discretion under the CBA temporarily to assign merchandise processors to different tasks within their areas based on such factors as the day's work volume, priority shipments, emergencies, or a particular employee's experience in a particular task. Taylor further testified that supervisors assigned people to different tasks in Area D on a daily basis.

It was not unreasonable for the hearing officer to credit the testimony of Patel and certain testimony given by Taylor. "The commission, and not the court, is the sole judge of the credibility and weight of evidence before it." *School Committee of Brockton*, 423 Mass. at 15 (citation omitted). The officer may well have thought the Everett witnesses were preoccupied with the label of "light duty," ignoring daily realities of life at Everett, or she may have found implausible the notion that injured employees were never accommodated with lighter jobs but employees with personality conflicts and personal preferences were so accommodated. We are in any event satisfied that there was substantial evidence to support the hearing officer's finding that there existed at Everett a practice of assigning merchandise processors temporarily to different and lighter duties.

3) **Determination of Qualified handicapped status**. Everett next suggests that the hearing officer erred as a matter of law in concluding that Patel was a "qualified

handicapped person" as defined by G. L. c. 151B, § 1(16).[12] Everett points to Patel's receipt of total disability benefits while she was unable to work and argues that she is precluded from claiming discrimination for a failure to accommodate her as a qualified handicapped person. Everett misconstrues both the applicable law and the facts.

One who makes no claim that she is totally disabled during the time she requests an accommodation and one who demonstrates her ability to work if afforded the requested accommodation is not precluded from bringing a discrimination claim. See *Labonte v. Hutchins & Wheeler*,

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[12]Chapter 151B, § 1(17) states, in relevant part, that a "handicap" is (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment." Major life activities include performing manual tasks and working. See c. 151B, § 1(20). A "qualified handicapped person" is defined as a "handicapped person capable of performing the essential functions of a particular job or who would be capable of doing so with reasonable accommodation to his handicap." G. L. c. 151B, § 1(16); *Beal v. Bd. of Selectmen of Hingham*, 419 Mass. 535, 541-542 (1995).

In addition, temporary disabilities that have not resolved constitute a handicap within the meaning of c. 151B, § 1(17). See *Dartt v. Browning-Ferris Industries, Inc.*, 427 Mass. 1, 16-17 (1998). Compare with *Hallgren v. Integrated Fin. Corp.*, 42 Mass. App. Ct. 686, 688-689 (1997) (temporary injury with no residual disability not a handicap within meaning of c. 151B). When Patel returned to work after her first injury, she was still experiencing the residual effects of her disability. Patel therefore was a qualified handicapped person as defined by c. 151B.

424 Mass. 813, 818-820 (1997), citing to *D'Aprile v. Fleet Servs. Corp.*, 92 F.3d 1, 4-5 (1st Cir. 1996). Because Everett views the evidence as demonstrating that Patel was either totally disabled or cleared to work without accommodation, it seeks to distinguish Patel from the *Labonte* plaintiff who was able to work with accommodations. This contention is without merit.

The hearing officer credited, but Everett would have us ignore, Patel's testimony that she had brought doctors' notes ordering light duty each time she returned to work and that she continued to request light duty each time Everett's representatives visited her home. "[The] request for accommodation . . . was evidence that the plaintiff was not claiming to be totally disabled." *Labonte*, 424 Mass. at 819. The fact that Patel worked for periods of time even though she was assigned to heavy duties supports Patel's claim that she was not totally disabled when she returned. Patel's medical records indicate that she had the ability to perform light duty during these periods. Compare with *Beal*, 419 Mass. at 539-543 (plaintiff's claim of total disability upon being asked to return to work removed issue of fact as to whether she could have performed essential elements of job). It was only as a result of Everett's refusal to accommodate her disability that Patel was rendered totally disabled from her job as a merchandise processor. "The plaintiff's evidence was that he was disabled to perform the job without reasonable accommodation, but quite able to perform the job given some reasonable accommodation." *Labonte*, 424 Mass. at 820 (plaintiff found to be qualified handicapped individual).[13] There

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[13]Furthermore, Patel is presumed to be a qualified handicapped person pursuant to G. L. c. 152, § 75B(1), of the

was no error in the hearing officer's determination that Patel was a qualified handicapped individual as defined by c. 151B.

4) **Light duty as reasonable accommodation.** Everett argues that it was arbitrary and capricious for the hearing officer to conclude that light duty was a reasonable accommodation for Patel. In support of its argument, Everett claims that it offered Patel a reasonable accommodation by suggesting that she go home if she did not feel well and, further, that it was not required to give her the requested accommodation of light duty.

Everett misreads the relevant issue presented. The question is whether the accommodation requested was reasonable and whether it imposed an undue hardship on Everett. See G. L. c. 151B, § 4(16); *Beal*, 419 Mass. at 539-540. Patel's request for light duty was eminently reasonable. As discussed above, Patel asked for a temporary assignment to a certain job function and the evidence showed that such assignments were routine. Since Everett makes no argument on appeal that assigning Patel

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workers' compensation statutes. "Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter [151B] ." G. L. c. 152, § 752(1).

to light duty would have constituted an undue hardship, we need not consider this issue further.[14]

5) **Damages for emotional distress**. The hearing officer awarded Patel $25,000 in damages for emotional distress. Everett contends that the hearing officer's finding that Patel had suffered emotional distress was unsupported by substantial evidence and that any emotional upset suffered by Patel was not due to Everett's actions. For substantially the reasons cited in MCAD's brief at pages 32-34, this argument is without merit.

6) **Interest assessment**. Patel was awarded interest on the $25,000 award, which Everett contends was excessive insofar as delays in the proceedings were not attributable to Everett. For substantially the reasons set forth in MCAD's brief at pages 34-36, the interest award will stand.

7) **Attorney's fees**. Everett challenges as well the award of counsel fees as a violation of its due process rights and, to prevail, would have us overrule the Supreme Judicial Court's recent decision in *School Committee of Brockton v. Massachusetts Com'n Against Discrimination*, 423 Mass. at 16, which controls in all material respects. Suffice it to say that we will not do so. The award stands.

8) **Patel's cross-appeal**. Patel appeals the hearing officer's decision not to award her back pay, contending

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[14]Everett again raises the issue that the hearing officer relied upon inadmissible hearsay in concluding that light duty was a reasonable accommodation. As discussed above, the hearing officer was entitled to accept such testimony.

that she is entitled to the difference between the workers' compensation payments she received and the wages she would have earned, including raises, had Everett not engaged in its discriminatory conduct. The hearing officer found that Patel's wage losses were made whole and the requested differential was unwarranted. There was no error.

An MCAD hearing officer has broad discretion to fashion remedies to effectuate the goals of c. 151B. See *Conway v. Electro Switch Corp.*, 402 Mass. 385, 387 (1988). An award of back pay is not required by c. 151B upon a finding of discrimination. See c. 151B, § 5 (relief granted may or may not include back pay).[15] Such an award may be granted if it is deemed appropriate under the circumstances. See *Buckley Nursing Home, Inc., v. Mass. Com'n. Against Discrimination*, 20 Mass. App. Ct. 172, 184 (1985). However, a back pay award should not make a complainant "more than whole." *Conway*, 402 Mass. at 388; see also *J.C. Hillary's v. Massachusetts Com'n Against Discrimination*, 27 Mass. App. Ct. 204, 207 n. 5 (1989). It thus lies within the officer's discretion to determine whether a complainant has been made whole.

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[15]Patel argues that when unlawful employment discrimination is found, there is a presumption that the victim is entitled to back pay. Patel points to federal court decisions interpreting the provisions of Title VII. "We may look to the interpretations of . . . the analogous Federal statute; we are not, however, bound by interpretations of the Federal statute in construing our own State statute." *Blare v. Husky Injection Molding-Systems Boston, Inc.*, 419 Mass. 437, 441 (1995), quoting from *College Town. Div. of Interco. Inc. v. Massachusetts Com'n Against Discrimination*, 400 Mass. 156, 163 (1987). Our courts have not held yet that such a presumption is required and we decline to do so in this case.

The hearing officer found, and Patel does not dispute, that Patel received $106,000 in non-taxable workers' compensation benefits for total disability from March, 1987, through October, 1990. Patel also collected partial disability benefits from November, 1990, through December, 1992, when her workers' compensation case was lump-summed in the amount of $43,000. Patel was found to be totally disabled and unable to work at all in April, 1990.[16] She admitted that she did not seek alternative employment until 1991 despite the fact that her physicians permitted her to perform lighter work for several years beforehand. The evidence amply supports the conclusion that Patel was made whole.

Patel argues, however, that Everett had the burden of demonstrating her failure to mitigate her damages but did not do so and that it was an abuse of discretion for the hearing officer to forego this mitigation inquiry.[17] Patel

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[16]Patel argued that she should receive the wage-compensation differential for the years in which she was totally disabled since Everett was responsible for her total disability. However, the hearing officer determined that it would be inequitable to hold that Everett's discri-minatory action was entirely responsible for Patel's total disability. Her initial injuries were a result of her normal duties and the third injury was an accident. The second injury and aggravation of the first was due to Everett's failure to accommodate her disability. The hearing officer determined that all of her injuries contributed to her total disability and this finding is borne out by the medical evidence in the record.

[17]An employer meets its burden of proof of mitigation of damages if it proves that a) one or more discoverable

cites to no authority in support of her contention that the provisions of c. 151B require such an inquiry. Moreover, since the hearing officer found that Patel had been made whole by the sum total of payments that she received, any back pay award to Patel thus would have made her more than whole. Because it was neither mandatory nor necessary for the hearing officer to assess the mitigation issue, the hearing officer therefore did not abuse her discretion in bypassing it.

Judgment affirmed.

By the court (Kass, Greenberg & Lenk, JJ.),

/s/ Ashley Ahear
Clerk

Entered: June 29, 2000

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opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment, b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and c) it was reasonably likely that the former employee would obtain one of those comparable jobs. See *Black v. School Comm. of Malden*, 369 Mass. 657, 661-662 (1976).

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-2174

EVERETT INDUSTRIES, INC.,
Plaintiff,

VS.

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Defendant(s).

JUDGMENT AFTER RESCRIPT

This action was appealed to the Appeals Court, the issues have been duly heard and the Appeals Court having duly issued a rescript;

IT IS ORDERED AND ADJUDGED:

Judgment Affirmed.

Dated at Dedham, Massachusetts this 21st day of September, 2000.

A TRUE COPY
Attest: Virginia G. Fuller
Deputy Assistant Clerk
9/21/00

/s/ Mon K. Hickey
Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-2174

EVERETT INDUSTRIES, INC.,
Plaintiff,

12/31/98 FILED 1/5/98

VS.

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Defendant(s).

ORDER OF JUDGMENT

December , 1997

CHERNOFF, J.

In accordance with the Memorandum of Decision and Order dated December 3, 1997, it is hereby ordered and adjudged that:

1. Defendant Divyabala Patel shall have judgment against plaintiff Everett Industries in the amount of $25,000.00 in damages for emotional distress under M.G.L. c. 151B. To this sum, the Court adds $28,750.00 in interest, representing interest to the date of the Memorandum of Decision and Order accruing year by year on the damages attributable to Patel's emotional distress for a total amount of $53,750.00

2. Plaintiff Everett Industries shall be obligated to pay Patel her attorney's fees in the amount of $24,368.00 and costs in the amount of $1,303.00. To these amounts the Court adds interest on the award of attorney's fees in the amount of $3,411.00 and interest on the award of costs in the amount of $182.00, representing interest accrued from the date of the Decision of the Full Commission on September 18, 1996 until the date of the Memorandum and Order of the Court for a total award of $29,264.00.

3. Plaintiff Everett Industries shall be obligated to pay Patel her attorney's fees for work done in connection with her defense of the appeal of this action pursuant to an Order to be issued separately by the Court following submission of the petition for fees under M.G.L. c. 151B.

4. As explained more fully in the Court's Memorandum and Order of December 3, 1997, judgment shall be entered for plaintiff Everett Industries and defendant Massachusetts Commission Against Discrimination on Defendant Patel's Motion for Judgment on the Pleadings as to Her Counterclaim and Cross-Claim on Damages.

SO ORDERED,

/s/ Paul A. Chernoff
Paul A. Chernoff
Justice of the Superior Court

Dated: December 31, 1997

A TRUE COPY
Attest: [signature]
Deputy Assistant Clerk
1/8/98

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-2174

EVERETT INDUSTRIES, INC.,
Plaintiff,

RECEIVED
1/8/98
CLERK OF THE COURTS
NORFOLK COUNTY

vs.

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Defendant(s).

PETITION FOR AWARD OF ATTORNEY'S FEES

Divyabala Patel petitions this Court for an award of attorney's fees in the amount of $11,227.50 for work reasonably expended in opposing successfully Plaintiff's Petition for Judicial Review of a decision of the Massachusetts Commission Against Discrimination. That decision found that Everett Industries, Inc. had discriminated against Patel by failing to provide her with reasonable accommodation for her disability and awarded her $25,000 in damages for emotional distress.

G.L. c. 151B §5 provides that "the Commission shall award reasonable attorney's fees and costs to any prevailing complainant." G.L. c. 151B §9 provides for an award of attorney's fees and costs to a plaintiff who prevails at trial "unless special circumstances would render such an award unjust."

Although the law does not expressly provide for an award of attorney's fees to a complainant who successfully opposes a petition for judicial review under G.L. c. 151B §6 and G.L. c. 30A §14, it is well-sealed that appellate courts may award attorney's fees for appellate

Attorneys Fees
Assessed at
$10,000
RAC
1/2/98

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-02174

EVERETT INDUSTRIES, INC.

VS.

Dated
ENTERED & FILED
12/9/97 12/9/97
CLERK OF THE COURTS
NORFOLK COUNTY

DIVYABLAL PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY PROCEEDING AND DEFENDANT DIVYABALA PATEL'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO HER COUNTERCLAIM AND CROSS-CLAIM ON DAMAGES

Pursuant to G.L. c. 151B, § 6, G.L. c. 30A, § 14 and Superior Court Standing Order No. 1-96, the Plaintiff, Everett Industries brought this action seeking judicial review of a September 1996 decision of the Full Commission of the Massachusetts Commission Against Discrimination in favor of the Defendant Divyabala Patel (Patel) on a claim of employment discrimination against Everet' Industries, her former employer. This case is before the Court on Everett Industries' motion for judgment on the pleadings on the appeal and Patel's motion for judgment on

the pleadings on the counterclaim and cross-claim. The Full Commission upheld the decision of the hearing officer that Everett Industries pay Patel $25,000.00 plus interest for unlawfully discriminating against Patel by not providing her with a reasonable accommodation during her period of handicap. The Full Commission also awarded $24,368.00 in reasonable attorney's fees and $1,303.00 for reasonable costs. Patel seeks an order for back pay. For reasons set forth below, the Full Commission's decision is hereby **AFFIRMED**.

PROCEDURAL HISTORY

On April 21, 1988, Patel filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) alleging that Everett Industries discriminated against her on the basis of her handicap by failing to accommodate her injury. On January 24, 1996, a Hearing Officer of the MCAD rendered a decision in favor of Patel. On February 7, 1996, pursuant to 804 CMR 1.16, Everett Industries filed a timely Notice of Appeal from the Hearing Officer's decision. In late September 1996, the MCAD, by decision of the Full Commission, affirmed the Hearing Officer's decision in favor of Patel. On October 18, 1996, Everett Industries filed this appeal to the Superior Court seeking review of MCAD's decision pursuant to G.L. ch. 151B, G.L. c. 30A and Superior Court Standing Order 1-96.

FACTS

The following facts are based upon the January 25 and 26, 1995 public hearing and the findings of Hearing Officer:

Patel began work for the Jordan Marsh Distribution Center (the Warehouse) as a merchandise processor in 1974. Prior to 1978 Patel's jobs did not involved lifting cartons, pushing metal carts or other heavy work. In 1978 Patel was assigned to Area D, aka D Side. D Side was divided into three areas - the conveyor belt, the china department and the floor. As part her duties, Patel began each day working on the conveyor belt where she stood and priced items. The work required no lifting or carrying heavy boxes or pushing merchandise. Later in the day she would work in the china department which involved lifting buckets of china from conveyor belts, carrying the buckets to a packing table, wrapping and packing the china in cartons, lifting the heavy cartons onto skids and pushing the skids to the shipping area. During this period of time there were thirty to thirty-five merchandise processors on the D side. Fifteen to twenty worked on the conveyor belt and three worked in the china department. Upon Patel's request, her supervisor agreed to assign her to the china department only when additional help was needed.

In 1984, Everett Industries entered into a contract with Jordan Marsh whereby Everett Industries became the employer of the merchandise processors at the Warehouse. Everett Industries assumed the collective bargaining agreement then in existence between the union representing the Warehouse workers (Teamsters) and Jordan Marsh.

After Everett Industries became Patel's employer, Jordan Marsh merchandise controller Bob McKay, the person responsible for directing and assigning work to Patel, usually assigned Patel to the floor and sometimes to the china department. Floor work consisted of processing boxes of merchandise too large to fit on the conveyor belt.

Patel was required to open the boxes, remove the merchandise, mark the pieces with labels, process the purchase order, place the boxes onto the skids and push the skids to the dock. At some point McKay was transferred and Patel's new supervisor, Sam Ragucci, did not change her assignment.

In early March 1987, Patel injured her left hand and wrist while attempting to remove a box containing luggage from a skid stacked high with boxes. Her treating physician asked her to refrain from using her hand and advised her to stay out of work. Patel received worker's compensation from March 4, 1987 through March 31, 1987.

Upon returning to work, Patel gave the Warehouse Manager, Paul Feeney, a doctor's note advising that Patel should not use her left hand. Patel also informed Ragucci that she could not use her left hand. Disregarding the limitations imposed by Patel's injury and her physician's note, Everett Industries assigned Patel to do heavy floor work. After two weeks she again left work because she could not perform her assigned duties with an injured hand and because she continued to experience pain. Patel returned to work in late April, 1987. She tendered a doctor's note to Feeney and told him that her injury had not completely healed. Feeney stated that he would discuss this with Patel's supervisor, Ragucci.

Ragucci continued to assign Patel to floor work. In response to Patel's request to be assigned to the conveyor belt on D Side until her hand healed, Ragucci told Patel that she should stay home if she did not feel well. Thereafter Ragucci assigned Patel to pack china. In May 1987, less than a month after her return, Patel injured her right hand

and was out of work from May 23 through June 3, 1987. Upon returning to work, Patel again spoke to her supervisors, informing them that she did not want to do the heavy floor work she had been doing.

On June 9, 1987, Patel was again injured while doing floor work when she was hit by a skid. She injured her right leg and left hand. As a result, of this injury, Patel required medical treatment and physical therapy and was out of work until the end of July, 1987. She received total disability worker's compensation from June 10, 1987 through July 29, 1987.

Patel again returned to work at the end of July, 1987 and worked for about one week. She experienced severe pain in her shoulder and hand, and was unable to perform the required heavy work. Patel did not return to work after early August 1987. According to Patel's treating physicians, Patel was capable of working in a non-strenuous job that did not involve stress to her left hand and arm. Everett Industries' representatives, Paul Meleedy and Dave Connelly, visited Patel at home to discuss her returning to work. Patel informed them that she wanted to return to work and asked them to reassign her to a different department or assign her lighter work within her area. The representatives told Patel that if she returned to work she would be required to perform the same heavy work and would not be transferred to another lighter-duty department or be assigned light duty work.

Dr. Peter Barry, Patel's treating rheumatologist testified that, in his opinion, when Patel returned to heavy work after the initial injury to her left hand and wrist, she tried to compensate by using her upper arm more, which

caused her to have forearm and left shoulder pain. Dr. Barry also testified that her second work accident may have further aggravated her condition and caused the condition of adhesive capsulitis or frozen shoulder diagnosed in early 1988. As of April 1990, Dr. Barry testified, Patel was totally disabled from any occupation.

There was evidence that numerous employees had been granted transfers or reassigned to different departments for a variety of reasons, including health-related problems, disagreements with the supervisor and argument with a co-worker and warehouse manager. Raymond Taylor, a manager at the Warehouse, testified that management had discretion under the union contract to assign merchandise processors on D Side to different tasks.

Patel suffered from emotional distress as a result of Everett Industries' refusal to return her to a light-duty assignment. Being the sole wage earner in her family at the relevant time, she worried about her family and her children's future. The Hearing Officer noted that she was genuinely upset when she cried during her testimony.

Patel received total disability worker's compensation benefits from August 4, 1987 when she ceased working for Everett Industries through October 31, 1990. From March 1987 through December 1992, Patel received a total of $106,000 in non-taxable worker's compensation benefits.

At all relevant times, the terms of Patel's employment were governed by the collective bargaining agreement negotiated by Teamsters and Everett Industries.

Between July 1987, when she stopped working for Everett Industries through July 1989, when Jordan Marsh resumed control of the Warehouse, Patel lost $42,640 in lost wages. Patel made no attempt to obtain other employment during this entire period.

On appeal, the Full Commission affirmed the above findings of fact and made the following findings on the record:

After a 1987 injury, Patel requested a reasonable accommodation by assigning her work that did not involve heavy lifting. Such work was available. Her request was denied. As a result of returning to work following this initial injury, she resumed heavy work packing china or unpacking and processing heavy items. This resulted in her left hand and wrist not fully healing and in the course of time, she suffered further injuries. She then stopped working and started collecting compensation benefits.

DISCUSSION

Pursuant to G.L. c. 151B, § 6, the decision of the hearing commissioner must be reviewed in accordance with the standard of review set forth in G.L. c. 30A, § 14(7). *J.C. Hillary's v. Massachusetts Commission Against Discrimination*, 27 Mass. App. Ct. 204, 206-207, *review denied, J.C. Hillary's v. Massachusetts Commission Against Discrimination*, 405 Mass 1202 (1989).

In reviewing a state administrative decision under G.L. c. 30A, § 14, the court may set the decision aside, modify it or compel any action unlawfully withheld or

unreasonably delayed if it determines that the substantial rights of any party may have been prejudiced because the agency decision is --

(a) In violation of constitutional provision; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Based on an error of law, or

(d) Made upon unlawful procedure; or

(e) Unsupported by substantial evidence; or

(f) Unwarranted by facts found by the court on the record as submitted or as amplified ...; or

(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G.L. c. 30A, §§ 14(7)(a) - 14(7)(g).

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals on Motor Vehicle Liability Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989); *Faith Assembly of God v. State Building Code Commission*, 11 Mass. App. Ct. 333, 334-335 (1981), citing *Almeida Bus Lines, Inc. v. Department of Public Utilities*, 348 Mass. 331, 342 (1965). In reviewing the agency decision, the court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. G.L. c. 30A, § 14 (7); *Flint v. Commission of Public Welfare*, 412

Mass. 416, 420 (1992); *Seagram Distillers Co., v. Alcoholic Beverages Control Commission*, 401 Mass. 713, 721 (1988); *Quincy City Hospital v. Labor Relations Commission*, 400 Mass. 745, 748-749 (1987). The reviewing court may not substitute its judgment on questions of fact for that of the agency. *Southern Worcester County Regional Vocational School District v. Labor Relations Commission*, 386 Mass. 414, 420-421 (1982), citing *Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Commission*, 372 Mass. 152, 154 (1977). "A court may not displace an administrative agency's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Southern Worcester*, 386 Mass. at 420. New claims may not be raised on appeal if they were not raised at the administrative appeal. *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commission*, 386 Mass. 64, 73 (1982); *Shamrock Liquors, Inc. v. Alcoholic Beverages Control Commission*, 7 Mass. App. Ct. 333, 335 (1979).

I. The Full Commission had subject matter jurisdiction.

Since the parties may not waive a jurisdictional flaw, this Court will decide on this issue although it was not raised in the proceedings below. *See Tardanico v. Aetna Life & Casualty Company*, 41 Mass. App. Ct. 443 (1996), *review denied, Tarcianico v. Aetna Life & Casualty Company*, 423 Mass. 1114 (circa 1996). Everett Industries argues that the Full Commission lacked subject matter jurisdiction over Patel's discrimination claim since that claim was pre-empted by Section 301 of the federal Labor Management Relations Act, 29 U.S.C. § 185.

"A state rule that purports to define the meaning or scope of a term in a [union] contract suit ... is pre-empted by federal labor law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). "Thus, questions relating to what the parties to a labor agreement agreed ... must be resolved by reference to uniform federal law." *Id.* at 211. However, § 301 "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.* at 212. Where the remedy being sought is provided for by state law, and the court's decision does not turn on the meaning of any provision of a collective-bargaining agreement, the state-law remedy is independent of the collective-bargaining agreement in that it does not require construing the agreement. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 407 (1988).

> "[Section] 301 pre-emption merely insures that federal law will be the basis for interpretingcollective-bargainingagreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without

> interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."

Id. at 409-410.

In this case, the issue is simply whether or not Everett Industries discriminated against Patel. In making its determination that Everett Industries's practices were discriminatory, the Hearing Officer cited the testimony of Patel and Raymond Taylor, a manager at the work site. Decision of the Hearing Officer at 12, 13.

The Hearing Officer found that Everett Industries had provided transfers in the past and refused to do so for Patel. Furthermore, the Hearing Officer found that this amounted to impermissible discrimination under state law. These findings did not require interpretation of the collective-bargaining agreement, but were based only on the testimony of the witnesses, and are therefore independent of the agreement for pre-emption purposes.

While it may be noted that both the Hearing Officer and the Full Commission commented that the collective-bargaining agreement does not prohibit transfers, such a finding does not require federal pre-emption, as the finding was not necessary for a finding of discrimination under Massachusetts law.

II. The Full Commission's conclusion that Patel was a qualified handicapped person was not based upon an error of law.

Everett Industries argues that because Patel received disability benefits as a totally disabled person, she cannot be an otherwise qualified handicapped person under G.L. c. 151B. This contention is without merit.

In a recent case, *Labonte v. Hutchins & Wheeler*, 424 Mass. 813 (1997), the Supreme Judicial Court distinguished a situation where handicap discrimination precedes a claim of total disability from that where a person claims to be totally disabled, is discharged, and then claims handicap discrimination. The Court concluded that receipt of total disability benefits does not *per se* preclude an individual from claiming to be an otherwise qualified handicapped person. *Labonte*, 424 Mass. at 819, 820.

The discrimination alleged was of a continuous nature dating from April 1987 through August 1987. The findings of the Full Commission show that Patel repeatedly requested lighter duty work, which was readily available, as a result of her injuries. It was only on the fifth occasion of Patel leaving work because of her injuries that she claimed that she was totally disabled and unable to return to work. On several prior occasions, Patel requested lighter work after returning from medical leave. Each time she was denied lighter work. She was capable of working if she had been given reasonable accommodation. Based on *Labonte*, Patel was not automatically ineligible to raise a discrimination claim merely because she started claiming total disability benefits.

III. The Full Commission's factual determinations were supported by substantial evidence.

Everett Industries objects to the findings of fact of the Hearing Officer and the Full Commission, claiming that there did not exist substantial evidence to warrant such findings.

"Substantial evidence" means such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, § 1. A determination by the court as to the correctness of an agency's decision is to be made upon consideration of the entire record, inducing evidence to the contrary. *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246 (1966). In administrative hearings, hearsay evidence may be presented and may constitute substantial evidence. *School Commission of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). As the agency is the sole judge of the credibility and weight of the evidence before it, and not the reviewing court, the court will defer to the fact-finding function of the agency where there is substantial evidence in support of its findings. *Id.*; *Buckley Nursing Home, Inc. v. Massachusetts Commission Against Discrimination*, 20 Mass. App. Ct. 172 (1985). The court will defer to the agency's right to draw reasonable inferences, *Ramsdell v. Western Massachusetts Bus Lines*, 415 Mass. 673 (1993), and will overturn findings only if the agency's reliance on the evidence was unreasonable as a matter of law. *School Commission of Brockton*, 423 Mass. at 15.

The Hearing Officer's findings were based on an assessment of the weight and credibility of witnesses'

testimony, as well as on reasonable inferences drawn from the evidence. After review of the entire record, this Court concludes that the Hearing Officer's findings, as affirmed by the Full Commission, were supported by substantial evidence and that there was no error of law.

A. The emotional distress award was supported by substantial evidence.

The standards for an award of damages for emotional distress under G.L. ch. 151B are not so stringent as those that apply in actions of tort for intentional infliction of emotional distress. *Buckley Nursing Home Inc.*, 20 Mass. App. Ct. at 182. "The finding of discrimination alone permits the inference of emotional distress as a normal adjunct of the employer's actions." *Labonte*, 424 Mass. at 823. In Chapter 151B cases, emotional distress damages may be awarded in the absence of physical injury of psychiatric consultation. *Id.*

The Hearing Officer found that Patel suffered from emotional distress as a result of not being able to work due to Everett Industries' refusal to accommodate her handicap. Patel testified that she worried about the financial position of her family as a result of the discrimination. She also testified that her health had been diminished. Conversely, the Hearing Officer also noted that there were contributory causes to her crying on the stand. Based on this testimony, the Full Commission's conclusion that Patel was emotionally distressed as a result of losing her health and job because of Everett Industries' failure to provide reasonable accommodations for her handicap was a reasonable inference clearly supported by substantial evidence.

B. The interest assessment was supported by substantial evidence.

Everett Industries argues that the interest award is unduly excessive since the proceedings were delayed due to Patel's dissatisfaction with her lawyer. It is well established and uncontested here that the MCAD has authority to award interest on damages from the date of the original complaint. *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination*, 400 Mass. 156, 169-170 (1987). It has been recognized that there is "force" to an argument such as Everett Industries makes here. *City of Boston v. Massachusetts Commission Against Discrimination*, 39 Mass. App. Ct. 234, 245 (1995). However, there is also evidence that the delay was occasioned by Everett Industries request that the hearings not proceed while they obtained tax records. Where it is not clear that inexcusable delay in the proceedings was caused solely by the prevailing party, reversal of an interest award is not warranted. *See New York and Massachusetts Motor Service, Inc. v. Massachusetts Commission Against Discrimination*, 401 Mass. 566, 584; *see also College-Town, supra* at 170 (MCAD's broad remedial authority extends to interest). Accordingly, this Court will uphold the interest awarded to Patel in the proceedings below.

V. The award of attorney's fees was not based upon an error of law.

G.L. c. 151B, § 5 was amended in January 1990 to allow the awarding of attorney's fees to prevailing parties. Because the complaint in this case was filed in April 1988, Everett Industries argues that an award of attorneys fees is improper, being a retroactive increase of liability. While it

is true that such an act will generally not be given retroactive effect without a specific provision to the contrary, the amendment in question is an exception, as has been conclusively and specifically reiterated. *School Commission of Brockton*, 423 Mass. at 16; *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 320 (1993).

VII. Failure to award Patel back pay was not based upon an error of law.

Patel argues that the Full Commission erred in not awarding her back pay. In so doing, she argues that a victim of employment discrimination is presumptively entitled to back pay and that denial of back pay frustrates the purposes of Chapter 151B. Furthermore, Patel claims that the Full Commission's finding that she failed to mitigate damages should not be held against her in assessing whether an award of back pay is justified.

Federal courts have recognized a strong presumption in favor of an award of back pay. *See e.g. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (back pay should be denied only where doing so does not frustrate the purposes of the statute); *Costa v. Markey*, 706 F.2d 1,7 (1st Cir. 1982), *cert. denied, Costa v. Markey*, 464 U.S. 1017 (1983) (successful plaintiff in discrimination suit presumptively entitled to back pay); *McCormick V. Attala County Board Of Education*, 541 F.2d 1094, 1095 (5th Cir. 1976) (presumption of back pay where discrimination proven). *But see Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 719 (1978) ("The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, *but it does not make meaningless the district courts' duty to determine that such relief is*

appropriate." (emphasis added)). The MCAD has broad authority to determine damages that best effectuate the purposes of 151 B. See G.L. c. 151B, § 5. The statute explicitly authorizes the MCAD to "take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back." *Id.* (emphasis added).

The Hearing Officer found that Patel had "been fully compensated" for her lost wages by the workmen's compensation benefits she received. It has been held that unemployment compensation may be deducted from back pay awards because back pay is not punitive in nature but that the goal is to restore the prevailing plaintiff to its rightful economic status. *Thurber v. Jack Reilly's Inc.*, 521 F. Supp. 238 (D. Mass. 1981), *aff'd, Thurber v. Jack Reilly's Inc.*, 717 F.2d 633 (1st Cir. Mass. 1983). This rationale may or may not apply to insurance, disability, or workmen's compensation benefits, depending on the applicability of the collateral source rule. *See Shea v. Rettie*, 287 Mass. 454, 457-459 (1934) (collateral source rule applies, back pay liability of employer not diminished by insurance proceeds); *D'Archangelo v. Loyer*, 215 A.2d 520, 523 (Vt. 1965) (applying holding in *Shea, supra* to proceeds from disability benefits); *Goldstein v. Gontarz*, 364 Mass. 800, 809 (1974) (proceeds from outside sources do not decrease defendant's liability). This issue, however, need not be reached because the Full Commission found that Patel had failed to seek alternative employment.

The Full Commission found that Patel was a qualified handicapped person up until April 1990 when, according to her physician, she became totally disabled. It was also found that Patel did not seek alternative work, in

mitigation of her damages, during the time prior to her total disability.

These findings were not clearly unsupported by substantial evidence. The Full Commission's conclusion that Patel was not entitled to additional damages was therefore within its discretion as effectuating the purposes of the statute.

ORDER

The decision of the Full Commission of the Massachusetts Commission Against Discrimination is **AFFIRMED** in all respects.

/s/ Paul A. Chernoff
Paul A. Chernoff
Justice of the Supreme Court

Dated: December 3, 1997

March 3, 1997
Motion is Allid.
(Draft, 2)
add: Mgn. v. Hickey
+ assistant

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-2174

EVERETT INDUSTRIES, INC.,
Plaintiff,

VS.

RECEIVED & FILED
CLERK OF THE COURTS
NORFOLK COUNTY

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Defendant(s).

PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY PROCEEDING PURSUANT TO MASS. GEN. L. CH. 151B, § 6, MASS. GEN. L. CH. 30A, § 14, AND SUPERIOR COURT STANDING ORDER NO. 1-96

The Plaintiff, Everett Industries Inc. ("Everett Industries"), hereby moves this court pursuant to Mass. R. Civ. P. 15(a), for leave to amend its Petition for Judicial Review and as grounds therefore states the following[1]:

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[1]Plaintiff's First Amended Petition for Judicial Review of Administrative Agency Proceeding Pursuant to Mass. Gen. L. ch. 151B, §6, Mass. Gen. L. ch. 30A, §14, and Superior Court Standing Order No. 1-96 is attached hereto.

1. On or about October 19, 1996, Everett Industries filed Plaintiff's Petition for Judicial Review of Administrative Agency Proceeding Pursuant to Mass. Gen. L. ch. 151B, §6, Mass. Gen. L. ch. 30A, §14, and Superior Court Standing Order No. 1-96.

2. Defendant Divyabala Patel filed an Answer, Counterclaim and Cross-Claim of Divyabala Patel on or about November 18, 1996.

3. Defendant Massachusetts Commission Against Discrimination filed its Answer on or about November 14, 1996.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-2174

EVERETT INDUSTRIES, INC.,
Plaintiff,

VS.

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
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The Plaintiff, Everett Industries Inc. ("Everett Industries"), hereby moves this court pursuant to Mass. R. Civ. P. 15(a), for leave to amend its Petition for Judicial Review and as grounds therefore states the following[1]:

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[1]Plaintiff's First Amended Petition for Judicial Review of Administrative Agency Proceeding Pursuant to Mass. Gen. L. ch. 151B, §6, Mass. Gen. L. ch. 30A, §14, and Superior Court Standing Order No. 1-96 is attached hereto.

1. On or about October 19, 1996, Everett Industries filed Plaintiff's Petition for Judicial Review of Administrative Agency Proceeding Pursuant to Mass. Gen. L. ch. 151B, §6, Mass. Gen. L. ch. 30A, §14, and Superior Court Standing Order No. 1-96.

2. Defendant Divyabala Patel filed an Answer, Counterclaim and Cross-Claim of Divyabala Patel on or about November 18, 1996.

3. Defendant Massachusetts Commission Against Discrimination filed its Answer on or about November 14, 1996.

4. This Court issued a tracking order which provides for a pretrial conference on March 17, 1997.

5. The parties have agreed to an amended briefing schedule.

6. Everett Industries is seeking to amend its Petition by adding Count VI which provides that Mrs. Patel's handicap discrimination claim is preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that accordingly, neither the Commission nor this Court have jurisdiction over Mrs. Patel's claim.

7. Everett Industries is further seeking to amend its Petition by amending Paragraphs 12, 23, 26, 30 and 54 to provide further factual clarification for the parties and the court.

8. Mass. R. Civ. P. 15(a) expressly provides that motions for leave to amend should be "freely given [by the court] when justice so requires".

9. "[L]eave should be granted unless there are good reasons for denying the motion". Mathis v. Mass. Elec. Co., 409 Mass. 256, 565 N.E.2d 1180, 1185 (1991).

10. Here, no good reasons exist to deny the motion. The factual clarification is set forth in the record. Count VI asserts an issue of law relating to the subject matter jurisdiction of Mrs. Patel's claims. Defendant will be able to adequately respond to Patel's claims. Defendants will be able to adequately respond to this issue of law. Allowing the amendment is consistent with Mass. R. Civ. P. 12(h) which provides "[w]henever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action". The lack of subject matter jurisdiction may be raised at any time up to final judgment on appeal, in any way, by any party, or by the court *sua sponte*.

WHEREFORE, for all of the foregoing reasons, Everett Industries respectfully requests the Court to grant Plaintiff's Motion for Leave to Amend its Petition for Judicial Review of Administrative Agency Proceeding Pursuant to Mass. Gen. L. ch. 151B, §6, Mass. Gen. L. ch. 30A, §14, and Superior Court Standing Order No. 1-96.

Respectfully Submitted,
for the Plaintiff,
EVERETT INDUSTRIES, INC.
by its attorney,

DATED: February 7, 1997

/s/ Ann M. O'Neill
Ann M. O'Neill, BBO# 554021
MURPHY, HESSE, TOOMEY & LEHANE
300 Crown Colony Drive
Quincy, MA 02269-9126
(617) 479-5000

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Plaintiff's Motion for Leave to Amend its Petition for Judicial Review of Administrative Agency Proceeding Pursuant to Mass. Gen. L. ch. 151B, §6, Mass. Gen. L. ch. 30A, §14, and Superior Court Standing Order No. 1-96 was served upon Jane K. Alper, Disability Law Center, Inc., 11 Beacon Street, Suite 925, Boston, MA 02108 the attorney of record for Defendant Divyabala Patel by hand on February 7, 1997 and Gregory A. Manousos, Counsel, Massachusetts Commission Against Discrimination, One-Ashburton Place, Boston, MA 02108, by hand on February 7, 1997.

/s/ Ann M. O'Neill
Ann M. O'Neill

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

DIVYABALA PATEL,
COMPLAINANT

v. **88-BEM-0451**

EVERETT INDUSTRIES,
RESPONDENT.

DECISION OF THE FULL COMMISSION

This matter came before us following a decision of the hearing officer in favor of the complainant. Respondent then filed a timely appeal. Complainant cross-appealed on the reward of damages

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 C.M.R. 1.00 et. seq.) and relevant case law. It is the job of the Full Commission to review the record of proceedings before the hearing officer. G.L. c. 151B, s.5. Findings of fact must be supported by substantial evidence which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding..." *Katz v. MCAD*, 365 Mass. 357, 365 (1974); G.L. c. 30A. At such hearings, it is the responsibility of the Commission to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact.

In the matter before us, complainant alleged and prevailed claims of discrimination on the basis of a temporary disability.

It has long been held that the Full Commission will defer to findings made by the hearing officer, so long as those determinations are premised upon substantial evidence. See e.g., *School Committee of Chicopee v. MCAD*, 361 Mass. 352 (1973); *Bowen v. Colonnade Hotel*, 4 MDLR 1007, 1011 (1982). Respondent has not offered any valid reason why we should depart from this long established principle, and we see no reason to do so.

Also, it has been the role of the Full Commission to determine whether the decision now appealed was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 C.M.R. 1.16(8) (f).

With this in mind, we first turn to the Respondent's contentions.

First, Respondent argues that Complainant can not establish a prima facie case since she was totally disabled during the period in question. However, we have reviewed the record carefully and agree with the hearing officer's determination. In that regard we note as follows:

- After a 1987 injury, Complainant requested a accommodation by assigning her work that did not involve heavy lifting.

- Such work was available

- Her request was denied.

- As a result of returning to work following this initial injury, she resumed heavy work packing china or unpacking and processing heavy items. This resulted in her left hand and wrist not fully healing and in the course of time, she suffered further injuries. She then stopped working and started collecting compensation benefits.

We hold today that receipt of workers' compensation or disability benefits does not **per se** exclude an individual from the definition of a "qualified handicapped person". This is in accord a variety of holdings in other jurisdictions.[1]

In the case before us, the complainant took legal positions in her injury compensation actions and in the instant case which were entirely consistent. That is, Complainant did not claim that she was disabled from all work, but only that she could not perform the heavy tasks to which she was assigned. This is an important factor in cases such as this one and we affirm the hearing officer's rulings in this regard. See e.g., *Ward v. Westvaco*, supra.

We also hold that the Commission may upon a review of all the facts and circumstances, find that the

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[1]Anzalone v. Allstate Insurance Co., 5 AD Cases 223 (ED La. 1995); Daffron V. McDonnell Douglas Corp., 874 S.W.2d 482 (Mo. 1994) , Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) ; Ward v. Westvaco Corp., 859 F.Supp. 608 (D.Mass. 1994;) and, many others.

essential functions of a particular position may contain functions which are at variance with a formal job description. The formal description is important evidence on the question of what functions are "essential" to a particular position but is not dispositive of the issue. It has been our experience that duties of a position may mutate with time, may be enhanced or diminished according to the needs of the shop and other forces as well and that a formal job description may "lag behind" the reality of the actual activities attendant to the job as it is actually performed in the shop. We will always examine the formal description, and give it due weight, but it is not error for a hearing officer to search through the facts and history of the events within the workplace to determine, de facto, the essential functions of a position. We find that an function cannot be "essential" if it is also not an "actual" function.

We also hold that the collective bargaining agreement in this case did not erase nor displace Complainant's statutory rights. The agreement did not explicitly or implicitly bar the requested accommodation. This is in contrast to those situations where the agreement either explicitly or implicitly bars the accommodation. In those situations an employer may assert the agreement as a defense: the accommodation in those instances may impose an undue hardship on the employer since it may require the employer to violate the agreement. This is not the case here. See e.g., *Heraty v. Atlas Oil Co.*, 15 MDLR 1143, 1164

(1993); *Emerick v. Libby Owens Ford Co.*, 875 F.Supp 393 (ED Tex. 1995)[2]

We have also examined the findings of fact made by the hearing officer and her award of damages. It is quite clear that there is substantial evidence in the record to support her findings and further that the award of damages here is well within the range of discretion afforded the finder of fact.

With regard to Complainant's cross appeal, we have examined the record and find that the hearing officer's award of damages was well within the range of discretion afforded to her, and that said award was premised upon substantial evidence. We find no errors of law in the award.

Therefore, the decision of the hearing officer is affirmed in all respects.

Having affirmed the decision of the hearing officer which found for the Complainant, we conclude that the Complainant has prevailed in this matter. Respondent argues though that the Complainant is not entitled to attorneys fees given that the conduct complained of occurred prior to 1990.[3]

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[2]This position has been adopted by the EEOC with regard to the Americans with Disabilities Act. See *Technical Assistance Manual*, III-16 (1994).

[3]St. 1989, c.722, s.27 amended G.L. c.151B by providing that the Commission "shall" award reasonable

This argument was rejected dispositively by the SJC in *Fontaine v. EBTEC*, 415 Mass. 309, 613 N.E.2d 881 (1993). There, the Court stated as follows:

> The plaintiff has brought to our attention a decision of the MCAD giving retro-spective effect to St. 1989, c.722, s.27 ...See *Charles T. Brown v. City of Salem Police Dept...* This legislation simply entitles plaintiffs who pursue their cases before the commission to a remedy commensurate with the remedy to which they would be entitled if they filed suit and prevailed in a state of federal court. As legislation providing an adequate alterative forum for remedying the impairment of an existing legal right, ...the statute was appropriately given retrospective application by the commission.

Fontaine, supra at 320, n.11.

As a prevailing complainant, Patel is therefore entitled to an award of reasonable attorneys fees and costs. In order to qualify as a "prevailing party" Complainant must have succeeded on some significant issue raised by the complaint in a manner which achieves some of the relief she has sought. See e.g., *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989). Though Complainant may be aggrieved on the issue of damages, we find that Complainant has nonetheless prevailed in this matter.

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attorneys fees to prevailing complainants. This provision was effective March 14, 1990.

The determination of what is a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the litigation of a claim of discrimination in the administrative forum of the Commission Against Discrimination. In rendering a determination of what is a reasonable fee, the Commission has adopted the lodestar methodology for fee computation. See *Fontaine v. EBTEC Corp*, 613 N.E.2d 881, 891 (1993); *Baker v. Winchester School Committee*, 14 MDLR 1079 (1992); *Brown v. City of Salem* 14 MDLR 1365 (1992). This methodology requires the Commission to undertake a two step analysis: first, the Commission will calculate the number of hours reasonable expended to litigate the claim and then multiply that number by an hourly rate considered to be reasonable; Secondly, the Commission will then examine the resulting figure, known as the "lodestar", and will adjust it either upward or downward or not at all depending on various factors.

Calculations of the hours reasonably expended involves separating out work done in relation to the individual doing the work (e.g., senior partner, junior associates, paralegal) eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; subtraction of hours which appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim; and, elimination of hours insufficiently documented. See generally *Grendel's Den v. Larkin*, 749 F.2d 945 (1st Cir. 1984); *Miles v. Samson*, 675 F.2d 5 (1st Cir.1982); *Furtado v. Bishop*, 635 F.2d 915 (1st Cir. 1980); *Baird v. Belloti*, 616 F.Supp.6 (D.Mass 1984); and, *Brown v. City of Salem*, supra.

The Commissions efforts to determine the number of hours reasonably expended will involve more than simply adding all hours expended by all personnel. The Commission will carefully review the Complainant's submission and will not simply accept the proffered number of hours as "reasonable". See e.g., *Baird v. Belloti*, supra.

In this matter, Complainant's counsel submitted an initial request and a supplemental request. The two submissions listed work performed over a period of several years:

Year	Hours Worked	Rate ($/hr)
1988	3.5	175
1991	5.3	175
1992	7.5	175
1993	16.2	225
1994	10.4	225
1995	80.1	225
1996	16.0	225

Respondent's, remaining objections are to the requested rate and the number of hours expended.

We have examined the rate and Respondent's argument and find that the rate is well within the range of rates common to the marketplace within which the complainant sought counsel. Respondent's argument that a less senior individual should have handled the bulk of the hours does not take into account the right of the Complainant to select counsel to do the necessary work, and it assumes the availability of less costly counsel without

demonstrating that such counsel was in fact available. We therefore find as reasonable, the rates of $175/hr and $225/hr for the periods in question.

We have examined the hours expended and Respondent's arguments. We are mindful of the fact that the overall net awarded damages, with interest, are roughly $50,000 and the fee requested about half that. Respondent appears to argue that since Complainant was not successful on her back pay claim some reduction is necessary, however, Respondent does not point to any particular activity as repetitive, duplicative or unnecessary. Given this and given further that the issue of liability (upon which Complainant did prevail) and the issue of back pay (upon which the complainant did not prevail) are quite intertwined, we are reluctant to adjust the fee downwardly in any significant manner. In this regard we also note that Respondent's counsel defended this matter vigorously, and in a highly competent and professional manner. It has been our experience that where a respondent's attorney asserts an aggressive defense, complainants' attorneys have to work harder to prove their case. This is what happened in the litigation before us. It was a hard fought case.

Still, consideration must be taken of the damages awarded as compared to the fee request. In the instant case the comparison would yield the following:

I. Fees

1988	$ 612.50
1991	927.50
1992	1,312.50
1993	3,645.00
1994	2,340.00

	1995	18,022.50
	1996	3,600.00
	Total	30, 460.00

II Damages:

Award: $25,000

Interest: 12% Simple (1% per month for the period April 1988 to July 1996 (98 months). This translates to an overall interest amount of 98% of the award, or $24,500 in interest.

Total Recovery: $49,500.

It appears to us that though the award of fees is not grossly disproportionate to the overall recovery, it represents a figure which is in excess of 60% of the amount awarded. We believe that in the instant case a 20% reduction would be equitable. This would bring the overall fees awarded to $24,368.00. We believe this is a reasonable figure and decline to adjust it further.

We also award costs in the amount of $1,303.80 as such appear to us to be reasonable and were not objected to by Respondent.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact, conclusions of law and the Order of the

hearing officer and issue the following order of the Full Commission:

(1) We affirm and incorporate all aspects of the order of the hearing officer;

(2) We award reasonable attorney's fees in the amount of $24,368.00 and reasonable costs in the amount of $1,303.80

This order represents the final action of the Commission for purposes of G.L. c.30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within 30 days of receipt of this decision, and must be filed in accordance with G.L. c.30A, c.151B, s.6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. Counsel should also note that any such action must name as a necessary party, the prevailing party in this matter.

SO ORDERED this ___ day of September, 1996.

/s/ Michael Duffy
Michael T. Duffy, Chairman

/s/ Dorca I. Gomez
Dorca I. Gomez, Commissioner

/s/ Charles E. Walker
Charles E. Walker, Jr., Commissioner

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

DIVYABALA PATEL,
COMPLAINANT

V. **88-BEM-0451**

EVERETT INDUSTRIES,
RESPONDENT.

DECISION OF THE HEARING OFFICER

Appearances:

Jane K. Alper, Esquire, for Complainant
Susan J. Rider and Ann M. O'Neill,
Esqs. for Respondent

I. PROCEDURAL HISTORY

On April 21, 1988, Divyabala Patel filed a complaint with this Commission in which she charged that Respondent discriminated against her on the basis of handicap, by failing to accommodate her injury. A probable cause finding was issued and efforts to conciliate the matter failed. The case was certified for public hearing and a hearing was held before me on January 25 and 26, 1995. The parties have submitted proposed findings of fact and conclusions of law. Having reviewed the submissions of the parties and the entire record, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. In 1974, Complainant Divyabala Patel was hired as a merchandise processor at the Jordan Marsh Distribution Center in North Quincy. (Tr. I 22) The Distribution Center is divided into separate work areas, known as Area A, Area B, the small package area, the security area, ready-to-wear, outbound and Area D. (Tr. I 27) Merchandise processors were assigned work by merchandise controllers.

2. Initially, Complainant was assigned mainly to Area B, where she worked at a conveyor belt and used a plastic gun to mark the price tickets on small items of merchandise such as baby clothes, purses and wallets. On occasion she was assigned to the small package area where she also worked at a conveyor belt marking items such as cosmetics, jewelry, and radios. Occasionally Complainant was assigned to the ready-to-wear area where she priced clothing on hangers using a plastic gun. None of these jobs involved lifting cartons, pushing metal carts or other heavy work. (Tr. I 27-31) I note that Complainant is extremely diminutive in size and stature and appears to be somewhat frail.

3. Approximately ten months after commencing employment with Respondent, Complainant was permanently assigned to Area A. Her duties in Area A were to price merchandise such as shirts and women's underwear using a plastic gun. She worked in Area A for approximately one year. (Tr I 31-32)

4. Sometime around 1978, Complainant was assigned to Area D, also referred to as "D side". "D side"

was divided into three areas; the conveyor belt, the china department and the floor.

5. As part of her duties on "D side", Complainant began each day working on the conveyor belt, where she stood and priced items. Later in the day she was assigned to the china department.

6. Complainant's duties on the conveyor belt involved pricing cookware, greeting cards, chocolates and other items in small boxes with gummed labels. The work required no lifting or carrying heavy boxes or pushing merchandise carts or wheeled metal carts, called skids. (TR 1 34-35)

7. The work in the china department involved lifting buckets of china from conveyor belts, carrying the buckets to a packing table, wrapping and packing the china in cartons, lifting the heavy cartons onto skids, and pushing the skids to the shipping area. During this period of time there were thirty to thirty five merchandise processors on the "D side". Fifteen to twenty worked on the conveyor belt and three worked in the china department. (Tr. 1 37-38)

8. While assigned to this area, Complainant lodged a complaint with her supervisor, John Mitchell, asserting that she was the only employee required to pack china. As a result, Mitchell agreed to permit her to work primarily on the conveyor belt and to assign her to the china department only when additional help was needed. (Tr. I 41)

9. In 1984, Respondent, Everett Industries, entered into a contract with Jordan Marsh whereby Everett became

the employer of the merchandise processors at the Jordan Marsh Warehouse. Respondent assumed the collective bargaining agreement then in existence between the union representing the warehouse workers (Teamsters) and Jordan Marsh. (Tr. II 76; Ex. R 3) From April 1984 until the end of 1985, Raymond Taylor was Start-Up Manager for Everett Industries at the warehouse. He was responsible for the day to day operation of the warehouse, including supplying the employees required to do the job at the warehouse. In July 1989, Jordan Marsh resumed operations as the employer of the warehouse employees.

10. After Respondent became Complainant's employer, Jordan Marsh merchandise controllers continued to direct and assign work to the merchandise processors. At about this time, Bob McKay became complainant's merchandise controller. McKay usually assigned Complainant to the floor and sometimes to the china department. (Tr. I 43) At some point McKay was transferred to "A side" and Complainant's new supervisor, Sam Ragucci, did not change her assignment. (Tr. I 44-46)

11. Floor work consisted of processing boxes of merchandise too large to fit on the conveyor belt. Complainant was required to open the boxes, remove the merchandise, mark the pieces with labels, process the purchase order, place the boxes onto skids and push the skids to the dock. (Tr. I 43-44)

12. In early March, 1987, Complainant was attempting to remove a box containing luggage from a skid stacked high with boxes. The boxes fell causing Complainant's left hand and wrist to be injured by the metal bar of the skid. (Tr. 47-49, Ex. C-1)

13. Complainant was treated by a physician, who told her her wrist was fractured and advised her to stay out of work and not to use her hand for a time. She received worker's compensation for her injury from March 4, 1987 through March 31, 1987. (Tr. 1 50-51)

14. Upon returning to work in early April, 1987, Complainant provided Warehouse Manager, Paul Feeney, with a doctor's note advising that she should not use her left hand. She also informed Ragucci that she could not use her left hand. (Tr.I 54)

15. Disregarding the limitations imposed by Complainant's injury and her physician's note, Respondent assigned Complainant to do heavy floor work. After two weeks, she again left work because she could not perform her assigned duties with an injured hand and because she continued to experience pain. During this time she underwent physical therapy. (Tr. I 55)

16. Complainant returned to work in late April, 1987. She again tendered a doctor's note to Feeney and told him that her injury was not completely healed and that her hand was still swollen. Feeney stated he would discuss this with her supervisor, Ragucci. (Tr. I 57)

17. Ragucci continued to assign Complainant to floor work. She requested to be assigned to the conveyor belt on "D side' until her hand healed. Ragucci told her that if she didn't feel well she should stay home. (Tr. I 57-59) Thereafter he assigned her to pack china.

18. In May, 1987, less than a month after her return, Complainant injured her right hand while packing

china and was out of work from May 23 through June 3, 1987. (Tr. I, 59-60)

19. When Complainant returned to work, she spoke, to Ragucci and to Dorothy O'Brien, the leader in "D section", informing Ragucci that she did not want to work the floor. Ragucci told her she had to work the floor and assigned her to unpack merchandise from boxes on a skid. (Tr. I, 61-62)

20. Complainant was injured again on June 9, 1987 when she was hit by a skid while doing floor work. She fell, injuring her right leg and left hand. As a result of this injury, Complainant required medical treatment and physical therapy and was out of work until the end of July, 1987. She received total disability worker's compensation from June 10, 1987 through July 29, 1987. (Tr.I. 63-64)

21. Complainant returned to work at the end of July and worked for about one week. She experienced severe pain in her hand and shoulder and was unable to perform the required heavy work. She did not return to work at all after early August, 1987. (Tr. I 66-67)

22. After Complainant had ceased working, representatives of Respondent, including Paul Meleedy and Dave Connelly visited her home on a number of occasions to discuss her status and the possibility of her returning to work. She informed them that she wanted to return to work and asked them to reassign her to a different department or assign her lighter work within her area. Complainant was told that if she returned to work she would be required to perform the same heavy work as was previously assigned to

her, and she would not be assigned to light duty or be transferred to another department. (Tr.77-79)

23. There was evidence that numerous employees had been granted transfers or reassigned to different departments for a variety of reasons. Two of Complainant's co-workers on "D side" Joan Ryburg and a women named Elaine, were assigned work on the conveyor belt after complaining of health-related problems. Joanne Sherman was transferred from "A side" to "ready-to-wear" because of disagreements with her supervisor. (Tr.I 82) Lee Buckley was transferred from "B side" to "A side" because of health problems. Pat Struzio was transferred from outbound to the small package area. Janet Hunter was transferred from "D side" to "A side" because of an argument with a co-worker and the warehouse manager. Mary Panacci was transferred against her will from "D side" to "A side". (Tr. 82-87)

24. According to Complainant's treating physicians, during the summer and fall of 1987, she would have been able to work in a non-strenuous job that did not involve stress to her left hand and arm. (Joint Exhibits 13, 17, 23, 32)

25. In early 1988, Complainant was diagnosed with "adhesive capsulitis" or "frozen shoulder", an inflammation of the capsule surrounding the shoulder joint. (Tr. II 10; Joint Exhibits 3, 35, 37, 39) Dr. Peter Barry, a rheumatologist, has been treating the Complainant since April 1989. He testified that in his opinion when Complainant returned to heavy work after the initial injury to her left hand and wrist, she tried to compensate by using her upper arm more, which caused her to have forearm and left shoulder pain. Complainant's second work accident

occurring in June 1987, in which she fell on her left side, may have further aggravated her condition and caused the condition of adhesive capsulitis. Dr. Barry testified that as of April, 1990, Complainant was totally disabled from any occupation. (Tr. II, 23-24)

26. Complainant received total disability worker's compensation benefits from August 4, 1987 when she ceased working for Respondent through October 31, 1990. From the period of March 1987 when Complainant was first injured on the job until December of 1992, when her workers' compensation claim was "lumped summed", she received a total of $106,000 in non-taxable worker' compensation benefits.

27. At all relevant times, the terms of Complainant's employment were governed by collective bargaining agreements negotiated by her union, the Teamsters and Respondent. (Joint Exhibits 1 and 2) These collective bargaining agreements contain no provisions either allowing or prohibiting changes in work assignment to reasonably accommodate employees with handicaps. The agreements contain provisions for bidding on job openings in a particular job classification and permit the employer to transfer employees from one job classification to another on a temporary basis. (Joint Exhibit 1) The agreements do not address transfers of employees within the same job classification to different areas of the facility or to different locations within the same area.

28. Pursuant to the collective bargaining agreements, the employer retains exclusive right "to assign employees to jobs, to transfer and to decide what work is to

be done, and when it is to be done, who will do it..." (Ex.J-1 and J-2.)

29. Paul Meleedy was Respondent's senior vice president for insurance at Trans Lease Corp. Respondent's parent corporation. He testified that Respondent never provided light duty for workers who were injured on the job, and he denied that he ever told Complainant he would look into light duty for her. (TR.II, 62)

30. Raymond Taylor testified that management had discretion under the union contract to assign merchandise processors on "D side" to different tasks. (Tr. II, 140)

31. Complainant's lost wages from July 1987 when she stopped working for Respondent through July, 1989, when Jordan Marsh resumed control of the warehouse were in the amount of $42,640. (Tr. I-95). Complainant made no attempt to obtain other employment during this entire period. (Tr. I 90,91) She testified that she was completely disabled after she stopped working for Respondent and, therefore, made no attempt to seek alternative employment for over four years thereafter. She applied for no jobs of any kind until "late 1991". (Tr. I 90-91).

32. Complainant suffered from emotional distress as a result of Respondent's refusal to return her to a light-duty assignment. She worried about her family and her children's future, since she was the sole wage earner in her family at the time. (Tr. I 93) Complainant wept when testifying about her emotional state and appeared genuinely upset, although she testified about a number of concerns that did not involve treatment related to her handicap

III. CONCLUSIONS OF LAW

G.L. c. 151B sec. 1 (17) defines a handicapped individual as one who has a "physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment, or is regarded as having such an impairment." Major life activities include such activities as "caring for oneself, performing manual tasks, walking, seeing, hearing, breathing and working.

Complainant has demonstrated that she is a handicapped individual within the meaning of c. 151B. She sustained an injury to her hand in March, 1987, which substantially limited her ability to perform manual tasks including those required by her job. Moreover, Complainant qualified for, and received workers' compensation for that injury. As a result of receiving such benefits, she is presumed to be handicapped, pursuant to G.L. c. 152 sec. 75B, which provides that any "employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter [151]B." Complainant sustained subsequent work related injuries which further incapacitated her and significantly limited her ability to perform certain job related tasks, particularly heavy work.

A qualified handicapped person is one who is capable of performing the job with reasonable accommodation. Complainant was capable of performing the essential functions of the job of merchandise processor

with a reasonable accommodation. Following her initial injury, Complainant returned to work and was instructed by her physician not to use her left hand. Complainant requested to work on a conveyor belt, or to perform other tasks of a merchandise processor which did not involve lifting. She had previously performed lighter duties and testified that many such tasks were available and that she was capable of performing them. Complainant's request that her injury be temporarily accommodated was denied.

Once Complainant establishes that an accommodation is possible, the burden of production shifts to the employer to demonstrate that an accommodation is not feasible. *Hogue v. MQS Inspection, Inc.*, ___F. Supp. ___, 3 AD Cases 1793, 1796 (D. Colo., 1995). Respondent has failed to demonstrate that Complainant's request was unreasonable or would have imposed an undue burden upon the company. Complainant was not seeking a permanent change of duties but only temporary reassignment to one of the many tasks in the warehouse not requiring heavy work until her injuries healed completely. The evidence shows that employees were routinely assigned to various tasks within their general area of assignment and job description.

Reallocation of duties after an employee has been injured has been held to be a reasonable accommodation. *See. e.g. Williams v. Town of Stoughton*, 13 MDLR 1385 (1991); *Henchey v. Town of North Greenbush*, 831 F. Supp. 960 (N.D.N.Y. 1993); *Masterson v. Runyon*, ___ F. Supp. ___, 3 AD Cases 1573 (E.D. Pa.1994); *Valdez v. Albuqueraue Public Schools*, ___ F. Supp. ___, 4 AD Cases 40 (D.N.M. 1994). The Commission's own Guidelines provide that... "Accommodations may take many forms including changes in work schedules and assigned tasks,

modification of job requirements..." 8 MDLR 2003,2008, (1986).

Respondent's assertion that it was prohibited from reassigning Complainant because of the collective bargaining agreement in effect at the time, was unsupported by the testimony of the company's own witness, Raymond Taylor, who confirmed that Respondent had discretion under the contract to assign employees to particular tasks within their area. Taylor's testimony was particularly significant, given that this was the crux of the matter. Moreover, do not accept Respondent's assertion that lifting heavy boxes and other strenuous activities required of Complainant were essential functions of the job of merchandise processor because such tasks are delineated in the job description. (Ex. R-2). The job description is not dispositive if there is other evidence to the contrary. *Henchey v. Town of North Greenbush*, 2 AD Cases 1232, 1237 (N.D.N.Y. 1993).

Since state law does not define what constitutes "essential functions" Complainant urges the Commission to look to the EEOC's regulations under Title I of the Americans with Disabilities Act of 1990 for instruction and guidance on this matter. The regulation at 29 C.F.R. s.1630 (n)(2) provides that a job function may be essential if: (i) the reason the position exists is to perform that function; (ii) the function is essential because of the limited number of employees available to perform that function; and/or (iii) the function is so highly specialized that the incumbent in the position has been hired to perform that function. It is clear from the evidence in the record that the limited duties Complainant was unable to perform as a result of her injury do not define the position of merchandise processor as

articulated by the criteria set forth in the regulations. While the particular job functions Complainant was temporarily unable to perform may have been essential functions of merchandise processors as a group, not every processor was required to perform every function delineated in the job description simultaneously. This is particularly true given the large number of employees available to perform the tasks within the job classification, the variety of tasks performed by merchandise processors, and the fact that Complainant, in the past, had not performed the functions in question. Since Complainant was a qualified handicapped individual and the accommodation she sought was reasonable, I therefore conclude that Respondent's failure to accommodate her temporary handicap constituted unlawful discrimination.

IV. **REMEDY**

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purposes of G.L. c. 151B, section 4. Such remedies may include an award of back pay or other out of pocket expenses, damages for emotional distress and attorney's fees.

Complainant ceased working entirely in August of 1987 asserting that she was no longer able to continue performing her assigned tasks due to the extreme pain she was suffering. In April of 1990, according to her physician, she was rendered totally disabled. At this point Complainant was no longer a qualified handicapped individual because she could not perform any of the essential functions of the job, even with a reasonable accommodation. Complainant did not seek any alternative

work for a period of more than four years, applying for no jobs until late 1991. In addition she collected workers' compensation benefits until October, 1990 and received a lump sum payment in December 1992. I conclude that under the circumstances, Complainant has been fully compensated for her lost earnings and has not demonstrated that she is entitled to an additional award of damages for lost wages.

However, Complainant did suffer emotional distress as a direct consequence of Respondent's conduct. Complainant's distress was apparent and she wept as she spoke of how Respondent's treatment impacted her emotionally. I conclude that Complainant suffered from emotional distress as a direct result of Respondent's failure to accommodate her. Her distress was compounded by her worsening medical condition, which was exacerbated by Respondent's unlawful conduct. Nonetheless, it is evident from Complainant's testimony that other factors unrelated to treatment she received because of her handicap also contributed to her emotional state. I conclude that Complainant is entitled to an award of damages for emotional distress in the amount of $25,000.

V. **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, I enter the following order:

(1) Respondent shall cease and desist from discriminating against employees on the basis of handicap.

(2) Respondent shall pay to Divyabala Patel the amount of $25,000 in damages for emotional distress plus

interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such date as payment is made or until such date as this obligation is reduced to a court judgment and post judgment interest begins to accrue.

Any party aggrieved by this decision may file a notice of appeal to the Full Commission within ten days of receipt of this decision. An appeal to the Full Commission also requires the filing of a petition for review which must be filed within 30 days of receipt of this decision.

SO ORDERED, this 24th day of January, 1996.

/s/ Eugenia M. Guastaferri
Eugenia M. Guastaferri
Hearing Officer

AGREEMENT

- BETWEEN -

TEAMSTERS LOCAL UNION NOS. 25 & 82
affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

EVERETT INDUSTRIES, INC. (DIVISION 06 & 00)

For The Period

JULY 1, 1984 to JUNE 30, 1987

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AGREEMENT

This Agreement is made and entered into this 1st day July, 1984, between Everett Industries, Inc. (Division 00 & 06) 62 Everett Street, Westwood, MA 02090, hereinafter referred to as the "Employer, and Teamsters Local Union Nos. 25 & 82, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "Union."

SCOPE OF AGREEMENT

All operations and work covered herein shall be performed exclusively by employees covered by the Agreement.

(a) This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event the entire operation is sold, leased, transferred, or taken over by sale, transfer, lease or assignment, receivership, bankruptcy proceedings such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this Agreement.

The Employer shall give notice of the existence of this Agreement to any transferee, purchaser, lessee, assignee, etc. of the operation covered by this Agreement. Such notice shall be in writing with a copy to the Union not

less than thirty (30) days prior to the effective date of sale or transfer.

ARTICLE I
RECOGNITION

The Employer recognizes the Union as the exclusive representative of the employees in the classifications set forth below for the purpose of collective bargaining with respect to wages, hours, and conditions of employment.

At Squantum Facility:

General Warehouse Worker
Incinerator Attendant
Porter
Merchandise Processor

Furniture Cabinet Makers
Furniture Cabinet Finishers
Major Appliance Repair Person
Major Appliance Repair Person

(Apprenticeship)
Working Lead

Maintenance:

Maintenance Mechanic (Licensed)
Maintenance Mechanic A
Maintenance Mechanic B
Maintenance Mechanic (Apprentice)

ARTICLE II
UNION SECURITY AND CHECK OFF

Section 1. Union Security

All employees who are members of the Union as of the effective date of this Agreement or on the date of the execution of this Agreement, whichever is later, shall remain members of the Union in good standing as a condition of employment. All employees who are hired after the date of the execution of this Agreement shall become and remain members in good standing of the Union as a condition of employment on and after the thirty-first day following the beginning of their employment or on and after the thirty-first day following the execution of this Agreement, whichever is later. The failure of any person to become and remain a member of the Union after required time shall obligate the Employer, upon written notice from the Union to such effect, and to the further effect that Union membership was available to such person on the same terms and conditions generally available to other members, and that such member has failed to tender the uniform dues and initiation fees required as a condition for the acquisition or retention of membership in the Union, shall obligate the Employer to discharge such person in five (5) working days after receiving such written notice.

Section 2. Check Off

The Employer, upon request by the Union and receipt by the Employer of signed authorization by the regular employees, agrees to deduct dues from the pay of the employees covered by this Agreement, and agrees to remit to the Union such deductions. No deductions shall be made

which are prohibited by law. The written authorization by the regular employee shall be furnished to the Employer in a form acceptable to the Employer.

Section 3. Credit Union

The Employer agrees to deduct certain specified amounts each week from the wages of those regular employees who shall have given the Employer written authorization to make such deductions. The amounts deducted shall be remitted to the Teamster's Local 25 Federal Credit Union, 548 Main Street, Charlestown, 02129, once a week. The Employer shall not make deductions and shall not be responsible for remittance to the credit union for any deductions for those weeks during which the regular employee has no earnings or in those weeks in which the regular employees earnings shall be less than the amount authorized for deduction.

ARTICLE III
SHOP STEWARDS

The Employer recognizes the right to the Union to designate shop steward and alternates from among the regular employees in the bargaining units set forth in this Agreement.

The authority of shop steward and the alternates so designated by the Union shall be limited to, and shall not exceed, the following duties and activities:

1. The investigation and presentation of grievances in accordance with the provisions of the Collective Bargaining Agreement;

2. The collection of dues when authorized by appropriate local union action;
3. The transmission of such messages and information which shall originate with, and are authorized by the local union or its officers, provided such messages and information
   (a) have been reduced to writing; or
   (b) if not reduced to writing, are of routine nature and do not involve work stoppages, slowdowns, refusal to handle goods, or any other interference with the Customers business.

Shop steward and alternates have no authority to take strike action or any other action interrupting the Customers' business.

The steward may request relief from his/her duties at any time to investigate and settle grievances and to present them to management. His/her supervisor will grant such relief promptly except when doing so might unduly interrupt operations or when the privilege is being abused.

The steward will be paid at their regular straight-time hourly rate for time lost from work while attending grievance meetings. The company reserves the right to discontinue the policy of paying for time lost if in the opinion of the company, the time spent in presentation of grievance is being abused.

Except as provided herein the steward shall be expected to carry out the duties assigned to him by management.

ARTICLE IV
LEAVE OF ABSENCE

Leave of absence without pay may, in the discretion of the Employer, be granted to regular employees for a period up to three (3) weeks, which may be extended for a like period of up to three (3) weeks in the discretion of the Employer. Union officials shall, upon written application by the Union and the regular employee, be given leave of absence in writing without pay up to three (3) weeks in each calendar year for the purpose of attending a Union Convention, conference or Union Executive Board meeting. No regular employees may engage in other employment during such leave. Failure to return on the first workday following the expiration of such leave or engaging in other employment during such leave or obtaining a leave under false pretenses may be cause for dismissal.

ARTICLE V
SENIORITY

Section 1. Seniority

Seniority for the purposes set, forth in this Article shall be as follows:

(a) All employees who work during a calendar year (in classification one through six) shall be considered casual employees. They shall have no seniority for the purpose of this article, provided, however, that upon completion of the probationary period (Sixty (60) consecutive scheduled working days) and continuance of

employment, seniority shall revert back to the first day of work in the bargaining unit. New established rates for classifications three (3) and four (4) per Schedule A shall be effective as of July 1, 1984. Casual employees may be discharged for any reason, or during the probationary period without recourse to the grievance procedure.

(b) An employee's seniority standing in a job classification will be determined by his/her bargaining unit service after he/she has completed sixty (60) working days during calendar year in the said classification one (1) through six (6). Mechanics' seniority will commence on the day they go on a list as a mechanic or apprentice. An employee's classification seniority as so established shall continue in effect in any classification as long as he/she is continuously employed, or on an leave of absence, or on a layoff not longer than twelve (12) months. Bargaining unit Seniority shall commence on the original date of employment in the bargaining unit and shall continue in effect as long as the employee is employed in the bargaining unit or on an approved leave of absence.

Section 2. Seniority Groups

It is agreed that the regular employees covered by the Agreement shall be divided into six (6) seniority groups:

1. General Warehouse Worker - Squantuni

2. Maintenance:
   - Maintenance Mechanic (Licensed)
   - Maintenance Mechanic A
   - Maintenance Mechanic B
   - Maintenance Mechanic (Apprentice)
3. Incinerator Attendants
   Porters
4. Processors
5. Furniture Cabinet Makers
   Furniture Cabinet Finishers
6. Major Appliance Repair Person
   Major Appliance Repair Person (Apprentice)

Section 2.A. Seniority Groups (Processing Area South Building) - Local Union 25

It is agreed that the regular employees covered by the Agreement shall be divided into four (4) seniority groups:

1. General Warehouse Worker - Squantum
2. Maintenance:
   - Maint. Mechanic (Lic.)
   - Maint. Mechanic A
   - Maint. Mechanic 8
   - Maint. Mechanic (Apprentice)
3. Incinerator Attendants/Porters
4. Processors

Section 2.B. Seniority Groups (High Bay Area North Building) - Local Union 32

It is agreed that the regular employees covered by this Agreement shall be divided into four (4) seniority groups:

1. Shippers - Credit Writers - Receiver - General Whse. - Workers - Stockmen/Operator's Mech (Hand Devices) - Set Up Person.
2. Merchandise Processor (Wrapper - Packer - Marker)
   Classification Group 4 on Schedule A
3. Furniture Cabinet Finisher A
   Furniture Cabinet Finisher B
   Cabinet Maker A
   Classification Group 5 on Schedule A
4. Major Appliance Repairman
   Classification Group 6 on Schedule A

Section 3.1. Layoffs & Recalls (Processing Area South Building)

When it becomes necessary to lay off regular employees due to a reduction in the working force, those regular employees shall be laid off in the following manner:

1. The regular employee with the least classification seniority in a classification which is to have a layoff shall be misplaced first.

   Within Seniority Group 2, Maintenance Mechanics, layoff by classification seniority means that if there is to be a layoff in the classification Maintenance Mechanic (Licensed) then the junior person on the Maintenance Mechanic (Licensed) list will be laid off. Similarly, if there is to be a layoff in the classification Maintenance Mechanic A, then the junior person on the Maintenance Mechanic

13, and the Maintenance Mechanic (Apprentice) classifications.

Within Seniority Group 3, if there is to be a layoff of Incinerator Attendants/Porters the least senior person will be laid off first.

Those regular employees in Seniority Group 1, General Warehouse Workers may exercise their classification seniority within Group 1. Those regular employees in Seniority Groups 1, 2, 3 and 4 will exercise such Seniority only within their own seniority group.

The aforementioned notwithstanding, shop stewards, for purposes of this section only, shall have super seniority.

Section 3.2. Layoffs & Recalls (High Bay Area North Building)

When it becomes necessary to lay off regular employees due to a reduction in the working force, those regular employees in each seniority group separately shall be laid off in the following manner:

(a) The regular employee with the least classification seniority in a classification which is to have a layoff shall be displaced first.

Such displaced regular employee shall then have the right to return to the classification only in his/her present group in which he/she

was employed, immediately prior to his/her assignment to his/her present classification and there displace the regular employee with the least seniority in the classification provided he/she is qualified to perform the work. The regular employee in the classification who is thus displaced may similarly displace regular employee in the classification in which he/she was employed immediately prior to being assigned to his/her present classification. Any such regular employee who is displaced who has not established classification seniority in any classification in his/her present group other than the one in which presently working may displace the regular employee with the least bargaining unit seniority in the lowest classification in the group, provided the bargaining unit seniority of the regular employee being displaced is less than the regular displacing he/she, and, provided, further, that the regular employee displacing is qualified to perform the work. If such regular employee does not have greater bargaining unit seniority than another regular employee in the lowest classification, or is not qualified to do the work, he/she may displace regular employee in the next higher classification who has less bargaining unit seniority, provided, he/she is qualified to perform the work. Such regular employee shall follow this procedure with respect to succeedingly higher classifications in his/her present group until he/she finds regular employee with less bargaining unit seniority

and provided he/she is qualified to perform the job on which he/she seeks to bump.

Those regular employees in Seniority Groups 1, 2 and 3 shall follow the above procedure within their respective group except after exhausting said rights in that group, they may on the same basis as set forth above displace the regular employee with the bargaining unit seniority in the lowest, classification in the other group.

Regular employees in Seniority Group 4 will exorcise their seniority rights only within group 4.

The aforementioned notwithstanding, shop stewards, for purposes of this section only, shall have super seniority.

(b) Recall Following a Layoff:

In the case of recall following a layoff, regular employees shall be recalled in the inverse order in which they were laid off in their classification.

(c) The Employer shall notify laid-off regular employees to return to work by its customary methods, for example, telephone or other personal notification but, in any event, also by registered request, with a copy of such notification to the Union at the regular employee's mailing address of record with the

Employer. Except for those regular employees laid off for thirty (30) days or less who shall report forthwith upon notification, the regular employees so notified shall return to work within a period of five (5) days after receipt of said registered mail notice from the Employer. If such regular employee fails to signify to the Employer an intention to return to work within two (2) days after the receipt of such notice, a regular employee shall lose all seniority standing and shall no longer be considered a regular employee. It is the responsibility of the regular employee to keep his or her record current both as to telephone number and mailing address. Should he or she fail to do so, the Employer is discharged from responsibility to make further attempts to recall the regular employees until such time as records are brought up to date.

Section 4. Job Openings

(a) General Openings

Whenever an opening occurs in any job classification, except in the case of recall following a layoff as provided in Section 3 above, and the Company determines that there is need for continuing the job, or when the Company determines that more regular employees are needed on a job, or when a new classification is added, said openings shall be posted on bulletin boards designated

for such purpose for bid as provided herein for a period of three (3) working days. Regular employees shall have the opportunity for bidding for such vacant jobs and shall do so by signing the notice of vacancy where posted. The posting shall list the job vacancy, job requirement and rate of pay. The Company shall have a period of one (1) working day after the expiration of the posting period in which to consider the seniority and qualifications of the bidders. The regular employees with the greatest bargaining unit seniority bidding for the job who is qualified shall be awarded the job pursuant to his bid therefore. A regular employee who establishes classification seniority and then bids on another job does not lose his classification seniority in his prior group classification until he establishes seniority in another classification. In the event none of the regular employees submitting bids is qualified, or if there are no bids, then the Company may fill the position with a new employee. While the job is open for bid and until such time as the vacancy is filled, there shall be no restriction on the Company's right to fill the vacancy on a temporary basis by assignment of employees.

Regular employees who bid into the Porter's classification will have seniority in the classification for layoff and recall purposes only from the date they go into the Porter's classification. They shall retain the seniority which they had immediately prior to entering the Porter's classification for all other purposes.

(b) Transfers

Regular employees may be temporarily transferred from one job classification to another by the Employer provided that such temporary transfer does not exceed thirty

(30) calendar days at any one time. The qualified regular employee with the least amount of bargaining unit seniority will be required to perform the temporary assignment unless a more senior qualified regular employee voluntarily accepts the assignment. Regular employees shall be permanently transferred as provided above under job vacancies.

Section 5. Loss of Seniority

A regular employee shall lose his seniority

(a) If he/she quits

(b) If he/she is discharged

(c) If he/she is laid off for more than twelve (12) months.

(d) If he/she fails to return to work within five (5) days from the date of receiving registered mail notice to return to work or fails to notify the Company of his/her intention to return within two (2) days, except for those regular employees laid off for thirty (30) days or less who fail to report for work forthwith upon notification.

(e) If he/she fails to return to work following a leave of absence upon the expiration of any sick leave.

(f) If absent from work for two (2) scheduled working days without reporting his/her absence to his/her supervisor.

Section 6. Posting of Seniority List

A list of employees arranged in the order of seniority in the particular group and showing the date of bargaining unit and classification shall be posted in the Fleet Maintenance Building for Maintenance employees, the West Entrance for North Building Employees and the South Entrance Corridor for all other regular employees, not later than January 31 and July 31 of each calendar year and a copy delivered to the Union. Any controversy over the seniority standing of any regular employee on the seniority list shall be submitted to the grievance procedure within fifteen (15) days after such posting or in the case of those on layoff at the time of posting within fifteen (15) days after their return to work.

Section 7. Transfer of Operations

If the Employer transfers operations covered by this Agreement to a new location within the territorial jurisdiction of Locals 25 and 82, the Employer shall transfer employees from the former location to the new location as needed, provided that when there are fewer jobs at the new location than existed at the former location, the Employer shall offer the opportunity to transfer to the new location to regular employees performing the said operations at the former location, provided an opening exists and in accordance with the abilities and qualifications of those desiring to transfer and provided that where abilities and qualifications are approximately equal, seniority shall prevail.

If the Employer closes facilities covered by this Agreement and does not transfer the operations to another facility within the territorial jurisdiction of Locals 25 and 82, the Employers shall notify and discuss with the Union the question of transfer of regular employees who perform such operations to other locations.

ARTICLE VI
MAINTENANCE OF STANDARDS

Section 1. Protection of Conditions

Nothing in this Agreement shall be interpreted as to diminish or eliminate any privilege which regular employees now enjoy. The Employer, however, reserves the right to discontinue or diminish any privilege provided the Employer in so doing shall not discriminate against regular employees covered by this Agreement.

This provision does not give the Employer the right to impose or continue wages, hours and working conditions less than those contained in this Agreement.

Section 2. Extra Contract Agreements

The Employer agrees not to enter into any agreement or contract with his/her employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such Agreement shall be null and void.

Section 3. New Classifications

If a new classification is established by the Company which is within the jurisdiction of the Union set forth in the Recognition clause of this Agreement, or a modification of an existing classification which substantially changes the job content the Company shall meet with the Union representative to establish the rate applicable thereto. If no agreement is reached within ten (10) days after the first meeting, then the Company may introduce the modified or new classification and the Union may take the matter to arbitration. If the arbitrator determines that a rate higher than that set by the Company is appropriate, the difference shall be paid to the regular employees involved retroactive to the original date of introduction of the new or modified classification and rate.

Section 4. Tool Allowance

The Company will pay up to a maximum of Thirty Dollars ($30.00) in each year for tool allowance pursuant to established procedures for regular employees.

ARTICLE VII
GRIEVANCE AND ARBITRATION PROCEDURE

Section 1.

The Steward as described in Article III shall follow specific grievance procedure as outlined in this Article. Grievances relative to interpretation or application of the terms of this Agreement shall be presented in writing to the Employer within seven (7) calendar days or one (1) calendar week after the occurrence. Any grievance not

presented in the above manner will be considered null and void. The Company agrees to submit its answer within four (4) calendar days from the reception of the grievance.

Section 2.

If the parties cannot reach agreement relative to the disposition of the presented grievance, then the Business Agent and the Company representative will attempt to adjust the difference as promptly as possible, but no later than fifteen (15) calendar days from the original presentation of grievance.

Section 3.

If the parties to this agreement cannot reach settlement of the alleged violation as presented, then the dispute shall be submitted to the New England Joint Area Committee. Expenses involved shall be shared equally by the Employer and the Union, and the decision shall be binding on both parties. If a case is deadlocked at the New England Joint Area level, it shall be submitted to an impartial umpire for handling. The two parties shall agree on such umpire.

Hearing shall be held within ten (10) days thereafter. The decision of the umpire shall be final and binding. The fees and costs of the umpire shall be divided equally between the Employer and the Union involved.

Failure of the Joint Area Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any stage,

or failure to comply with final decision withdraws the benefit of this Article.

The procedures set forth herein may be invoked only by the authorized Union representative or the Employer.

ARTICLE VIII
DISCHARGE OR SUSPENSION

Section 1.

The Employer shall not discharge nor suspend any regular employee without just cause. In all cases involving the discharge or suspension of a regular employee, the Company must notify the regular employee in writing of his discharge or suspension and the reason therefore within two (2) working days from the time of discharge or suspension. Such written notice shall also be given to the shop steward and a copy mailed to the local union office within two (2) working days from the time of the discharge or suspension.

Section 2.

In respect to discharge or suspension but except in cases of serious misconduct, such as but not limited to drunkenness, drug abuse, theft or assault, the Employer must give at least one warning notice of the specific complaint against such regular employee in writing, and a copy of the same to the Union and the shop steward. When written disciplinary action is taken against any regular employee, the Union Business Agent and the regular employee shall be furnished a copy thereof within seventy-two (72) hours. The warning notice as herein provided shall not remain in effect for a period of more

than nine (9) months from the date of the occurrence upon which the complaint and warning notice are based.

Section 3.

A discharged or suspended regular employee must advise his local Union in writing, within two (2) working days after receiving notification of such action against his/her, of his/her desire to appeal the discharge or suspension. Notice of appeal from discharge or suspension must be made to the Employer in writing within five (5) days from the date of discharge or suspension. At this point, the matter may be presented in conformance with Step 2 of the grievance procedure.

ARTICLE IX
MANAGEMENT

1. Except as otherwise expressly provided in this Agreement, the direction of the working forces including, but not limited to, the right to hire, to discipline or discharge for just cause, to assign employees to jobs, to transfer employees within the facilities, to increase and decrease the working force, the schedules and methods or processes to be used in connection therewith, and the determination of the hourly, daily and weekly schedules of employment are vested exclusively in the Employer.

2. The Employer has the sole right to run its business, and without limiting the generality of the foregoing, and except as may be otherwise specifically provided in this Agreement, it is up to the Employer to decide, for example, how many facilities it will have, where they will be located, what operations will be performed therein, what equipment

will be used, what work is to be done, and when it is to be done, who will do it, the extent to which it may have things done by other companies or individuals, and how operations will be scheduled.

ARTICLE X
PICKET LINES

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event a regular employee refused to enter upon any property involved in a primary labor dispute, or refused to go through or work behind any primary picket line, including the primary picket line of unions party to this Agreement, and including primary picket lines at the Employer's place of business.

ARTICLE XI
SAFETY AND ACCIDENTS

The Employer will comply with laws regarding safety, health, sanitation and working conditions properly required by the United States Department of Labor or any other governmental or administrative body having jurisdiction over the facilities covered by this Agreement. Any regular employee involved in any accident shall immediately report said accident and any physical injury sustained, and at the same time shall make out an accident report in writing on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to the accident. Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

Employees shall immediately or at the end of their shift report all defects of equipment. Such reports shall be made on forms furnished by the Employer, one copy to be retained by the employee.

ARTICLE XII
SANITARY CONDITIONS

The Employer agrees to maintain a clean, sanitary washroom having running water and toilet facilities. The employees agree to cooperate with the Employer in so maintaining these facilities. Employees failing to cooperate shall be subject to disciplinary action, and employees engaging in vandalism or defacement of property shall be subject to immediate dismissal.

ARTICLE XIII
LOSS OR DAMAGE

Employees shall not be required to compensate the Employer for the monetary value of the, loss or damage of merchandise and/or equipment unless the loss or damage is caused by the employee's willful disregard of his responsibilities as an employee.

ARTICLE XIV
WORK ASSIGNMENTS

The Employer agrees not to direct or require his employees who are not in the bargaining unit to perform work customarily performed by the employees in the bargaining unit here involved.

ARTICLE XV
SEPARATION FROM EMPLOYMENT

Upon discharge the Employer shall pay all money due including vacation pay to the regular employee. Upon quitting the Employer shall pay all money due the regular employee on the payday in the week following such quitting.

ARTICLE XVI
UNIFORMS

Whenever the Employer requires any of the regular employees referred to herein to wear uniforms, such uniforms shall be furnished in good condition, drycleaned where required, and mended by the Company. The regular employee shall use reasonable care to keep the uniform in good condition, and shall be liable for lost items.

The Employer agrees to furnish, as needed, winter jackets and raincoats to regular employees.

General warehouse workers in the dock area will be furnished with jackets and gloves for use when required by weather conditions which will be replaced when worn out and subject to rules to be established.

The Company will issue to Maintenance regular employees three (3) sets of uniforms in the Spring and three (3) sets in the Fall as required.

ARTICLE XVII
WORKMEN'S COMPENSATION

Section 1.

The Employer agrees to cooperate towards the prompt processing of employee on-the-job injury claims when such claims are due and owing as required by law.

The Employer shall continue to provide Workmen's Compensation protection as required by law.

Any Employee who is injured on the job and is sent home, or goes to a hospital, or to a doctor's office shall receive pay at his/her applicable hourly rate for the balance of his/her regular shift on that day. An employee who has returned to his/her regular duties after sustaining a compensable injury who is required to receive additional medical treatment during his/her regularly scheduled working hours as a result of such compensable injury shall be paid at his/her regular hourly rate for scheduled hours worked during which he/she is absent for such purposes. The Employee shall notify his/her supervisor of the time when he/she will be absent for such purpose and the time of return. This paragraph is not intended to be applicable to absences beyond a portion of a regular workday.

ARTICLE XVIII
EXAMINATION AND IDENTIFICATION FEES

Section 1. Examination

All examinations when required by the Employer and performed under his/her direction shall be paid by the

Employer. Regular employees, other than applicants, shall be paid for all time required to take all such examinations during their regular working hours.

Section 2. Identification

Should the Employer find it necessary to require employees to carry or record full personal identification, such requirements shall be complied with by the employees. The cost of such personal identification shall be borne by the Employer.

ARTICLE XIX
MILITARY SERVICE

Section 1.

The Employer will comply with the provisions of all laws of the United States and the Commonwealth of Massachusetts with reference to the re-employment rights of those regular employees who leave the service of the Employer to serve in the Armed Forces of the United States.

Section 2.

A regular employee required to serve two (2) weeks military active duty shall, upon application, receive an amount by which one (1) week of his/her basic weekly salary from the Employer exceeds one (1) week of his/her military pay, provided he/she has had sixty (60) days continuous service with the Company prior to the commencement of said military duty and provided said regular employee, if eligible for two (2) weeks' summer

vacation takes one (1) week of his/her vacation simultaneously with one (1) week of his/her military duty and the other week of his/her vacation at a time other than when he/she is on military reserve active duty.

Regular employees not eligible for any vacation or eligible for only one (1) week of vacation will receive the difference between one week's Company pay and one week's military pay.

This allowance is limited to one (1) week in each calendar year.

ARTICLE XX
UNION BULLETIN BOARDS

The Employer agrees to provide suitable space for the Union bulletin board at each facility covered by this Agreement. Postings by the Union on such boards are to be confined to official business of the Union.

ARTICLE XXI
UNION ACTIVITIES

There shall be no unlawful discrimination against any employee because of union membership or activities.

ARTICLE XXII
VISITS TO PREMISES

Upon request made to the Employer, any complaint with the Employer's security regulations, authorized Union officials shall be permitted to visit the Employer's premises

for the purpose of carrying out duties arising from this Agreement.

ARTICLE XXIII
MEAL AND REST PERIODS

The Company agrees to a minimum of one-half hour meal period for the employees working in #1, #2, #3, #4, #5, and #6. All employees shall receive one 20-minute break period each day between second and third hour of work.

Any employee who leaves his/her work area for any reason whatsoever except for lunch breaks, as described above, must obtain permission or use authorized procedures.

ARTICLE XXIV
WAGES

It is mutually agreed that the rates of pay shall be as in the attached Schedule A.

ARTICLE XXV
WORKWEEK

Section 1. Paid for Time

All Employees covered by this Agreement shall be paid for all time spent in the service of the Employer. Time shall be computed for the time that an employee registered in until the time he/she is effectively released from duty. If there be insufficient work in an employee's regular classification to complete a full day, the Employer may assign such employee to any work that is available and

such employee shall receive no reduction in pay for such work. Employees when reassigned to another work area shall take their time card when reporting to the new area.

Regular employees (except casual employees) who are called in to work and who report and work as scheduled will be provided with a minimum of three (3) days of work within the work week in which they report for work or pay in lieu thereof, provided, however, this requirement shall nor apply during the week in which Christmas occurs, during the week in which Thanksgiving occurs, during the week in which a personal holiday occurs, nor to those called to work on Friday, but in the latter case the exception shall only apply to the extent of ten percent (10%) of the regular (but not casual) employees in the bargaining unit.

Section 2. Workweek - All Employees

The basic workweek shall be forty (40) hours consisting of eight (8) - hours per day and five (5) consecutive days within the seven (7) days, Sunday through Saturday, inclusive, in each calendar week, and casual employees will be paid for hours worked.

Section 3. Time Clocks

Time clocks shall be available for recording purposes and shall be located at reasonable convenient places in all buildings to which covered employees are assigned.

Section 4. Posting Schedules

Working schedules shall be posted by the Employer.

In the event of a change in the regular working schedule the regular employee affected shall be notified one (1) week in advance.

A pay differential of ten cents (1O) per hour will be paid to all regular employees who are scheduled to start work at 2:00 PM through 4:00 AM. Regular employees required to work before their regular scheduled starting time shall be paid one and one-half times their regular rate for such work provided they work their regular shift on such days.

Section 5. Report Time

Any employee requested to and actually reporting for work as scheduled by the company shall be paid not less than his/her regular day's pay; and if he/she is on his/her scheduled day off, he/she shall be paid at the rate of time and one-half.

The Company will post twice each year no later than January 31 and July 31 bids for available starting times for the regular employees in the General Warehouse Worker's classification pursuant to an established procedure.

Section 6. Overtime

Overtime shall be paid at the rate of time and one-half the regular employee's regular rate of pay for all time worked in excess of eight (8) hours in a day or in

excess of forty (40) hours in a workweek, whichever total number overtime hours, daily or weekly is greater, but not both.

Wherever more than one provision relating to overtime or premium pay is applicable to the same period of time worked, an overtime or premium rate will be paid only once for that period, and if different overtime or premium apply, the higher shall be paid.

Overtime is a required condition of employment. When overtime is necessary, regular employees involved shall be notified. A regular employee shall not work overtime and the Company shall not pay for overtime work unless the regular employee is notified.

There are two (2) types of overtime, namely, Scheduled Overtime and Unscheduled Overtime. Scheduled Overtime is that work in excess of the scheduled work whereby the regular employees involved shall be notified as far in advance as possible, but at least one and one-half hours before the end of their regularly scheduled workday. Unscheduled overtime is that work in excess of the scheduled workday where, due to a need to complete present work or due to some other emergency situation, advance notification is not feasible.

Scheduled overtime shall be offered by seniority in each classification starting with the most senior regular employee and assigned by starting with the least senior regular employee. Unscheduled overtime shall be assigned to the regular employee(s) who is (are) performing the work for which the unscheduled overtime is necessary.

Any regular employee called to work before his/her regularly scheduled reporting time will not be required to take time off to Compensate therefor.

Employees shall be granted a ten (10) minute break if required to work two (2) hours or more of overtime. In the case of scheduled or unscheduled overtime, and when there is an extension of the normal workday, such break is to be taken in the local cafeteria at the end of the normal workday.

Section 7. Sunday Work

Any employee requested to and actually reporting for work on Sunday shall be guaranteed eight (8) hours work at time and one-half.

Section 8. Transfer of Individual

When a regular employee is permanently transferred to another job in accordance with the provisions of this Agreement, he/she shall receive the rate of the job to which he/she is transferred, except as provided below.

When a regular employee is temporarily transferred from his/her regular classification he/she shall receive the rate of this regular classification or the rate of the job to which he/she is temporarily transferred, whichever is higher. Any overtime worked by a regular employee who has been temporarily transferred shall be paid on the basis of the rate of pay applicable during the time of such temporary transfer.

Upon return to his/her regular classification, the rate of pay of a regular employee shall be the same as what it would have been if he/she had continued to work in his/her regular classification.

There shall be no upgrading of Processors to General Warehouse when there are General Warehousemen on layoff.

Section 9. Casual Employees

Casual employees shall not enjoy seniority rights. Casual employees will not be used for the purpose of displacing regular full-time employees.

ARTICLE XXVI
VACATIONS

The regular Employee's vacation entitlement shall be based upon the regular employee's anniversary date of employment. A regular employee who completes six (6) months continuous employment on his or her anniversary date shall be entitled to one (1) week of vacation.

A regular employee who completes one (1) year of continuous employment on his/her anniversary shall be entitled to receive two (2) weeks vacation.

A regular employee who completes five (5) years of continuous service on his or her anniversary date shall be entitled to receive three (3) weeks of vacation.

A regular employee who completes ten (10) years of continuous service on his or her anniversary date of employment shall be entitled to receive four (4) weeks of vacation.

The vacation availability must be posted by the Employer thirty (30) days prior to the vacation period from January 1 to December 31, to allow regular employees in the order of their seniority to make their vacation selections. However, granting of these requests will be subject to the operational needs of the Employer.

Vacation periods are not cumulative, but each vacation is to be taken within the calendar year in which it is due.

The dollar amount of one weeks vacation will be computed by dividing the individuals total earnings exclusive of allowances, as reflected on the W-2 withholding tax statement of the previous year by fifty-two (52). This computed weekly vacation amount or the individual's weekly base pay of forty (40) hours if greater will be paid for each week of vacation eligibility. All regular employees must work a minimum of twenty-five (25) days to qualify for vacation.

ARTICLE XXVII
HOLIDAYS

The following days will be considered paid holidays for regular employees:

New Years Day	Columbus Day
Washington's Birthday	Veterans Day

Memorial Day	Thanksgiving Day
Independence Day	Day after Thanksgiving
Labor Day	Christmas Day
	Two Personal Days

Regular employees who qualify for holiday pay shall receive their regular straight-time day's pay for the holidays listed herein. In addition, regular employees required to work on such holidays shall receive one and one-half times their regular hourly rate for such time worked.

The Personal Days holidays are to be scheduled as far in advance as possible (at least seven (7) days in advance). Permission for Personal Days are subject to the operating needs of the business and are not to be used as extensions of vacation time or holidays.

When a paid holiday falls within a paid vacation, the regular employee shall receive an additional day's pay for such holidays.

In order to qualify for holiday pay, it shall be necessary for each regular employee:

1. To have worked on the payroll for sixty (60) days immediately preceding the holiday; and
2. To have worked the regular scheduled workday immediately preceding the holiday and the regular scheduled workday following the holiday, except in the case of an employee on lay-off status for less than thirty (30) days in which case the laid off regular employee in order to quality for holiday pay must, have worked his last regular scheduled workday

immediately preceding his/her layoff and his/her first regular scheduled workday following his/her recall from layoff.

If a regular employee has been on the payroll for sixty (60) days immediately preceding the holiday and is absent from work one (1) week longer because of an illness which has been approved, he/she may qualify for holiday pay, provided:

1. The regular employee has worked the regular scheduled workday preceding the holiday, before the approved illness; and
2. The regular employee has worked the regular scheduled workday following the holiday on his/her return from an approved illness.

ARTICLE XXVIII
LIE DETECTOR TEST

The Company shall not require or request that a regular employee or applicant for employment take a polygraph or any other mechanical form of lie detector test.

ARTICLE XXIX
FUNERAL LEAVE

In the event of a death in the immediate family of a regular employee, the regular employee shall be allowed up to five (5) day off without loss of pay, including the day of burial and the two (2) days preceding the day of burial and the day following and an additional day, if the funeral takes place outside the Commonwealth of Massachusetts.

For the purpose of this Article, an regular employee's immediate family shall be deemed to include only the following: Spouse, children, grandchildren, brothers, sisters, parents and the regular employees grandparents.

In the event of the death of regular employees brother-in-law, sister-in-law, son-in-law, daughter-in-law, foster parents or parents-in-law, one (1) day off without loss of pay will be allowed.

If a regular employee is on vacation pursuant to Article XXVI herein, but would otherwise be entitled to Funeral Leave as herein provided, he or she shall be allowed time off with pay equivalent to the Funeral Leave to which he or she was entitled but for the vacation.

The Employer may demand from the regular employee verification of the death, such as an obituary notice, and may also demand verification of the relationship between the regular employee and the deceased.

ARTICLE XXX
JURY DUTY PAY

A regular employee serving as a juror shall be paid for time spent as a juror, the difference, if any, between his or her regular straight time pay and pay received as a juror. During the period of such jury service the regular employee is to report to work when his or her services as a juror are not required. Regular employees shall notify the Employer within forty-eight (48) hours after they receive notice to serve on a jury.

ARTICLE XXXI
NO STRIKE OR LOCKOUT

There shall be rio strikes, slowdowns, stoppages or suspensions of work by the Union or by any employees within the bargaining unit, nor lockouts by the Employer for the duration of this Agreement.

ARTICLE XXXII
COURT APPEARANCE

When a regular employee is required to appear in any court for the purpose of testifying because of any accident, he or she may have been involved in while in the Employer's service during working hours, such regular employee shall be reimbursed in full by the Employer for all straight-time earnings lost because of such appearance.

ARTICLE XXXIII
AUTHORIZED SICK TIME PAY

Authorized sick time will be paid when a regular employee is absent due to personal illness. Sick time pay is limited to the following:

1. Pay for the second (2nd) and third (3rd) days of continuous absence due to personal illness for regular employees who have accrued ten (10) years or more of Seniority.
2. Pay for the first (1st), second (2nd), and third (3rd) days of continuous absence due to personal illness for regular employees who have accrued twenty-five (25) years or more of Seniority.

ARTICLE XXXIV
SEPARABILITY AND SAVINGS CLAUSE

If any Article or Section of this Agreement should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations upon the request of either party in writing for the purpose of arriving at a mutually satisfactory replacement for such Article or Section during the period of invalidity or restraint. If the parties do not agree on a mutually satisfactory replacement within ninety (90) days after receipt of the stated written notice, either party shall be permitted to refer the issue to the grievance procedure herein provided.

ARTICLE XXXV
PENSION FUND

(a) This Pension Article shall supersede and prevail over any other inconsistent provisions or articles contained within this agreement.

(b) Commencing with the 1st day of July, 1984 and for the duration of the current collective bargaining agreement between Local Union 25 and the Employer, and any renewals or extensions thereof, the Employer agrees to make payments to the New England Teamsters and Trucking Industry Pension Fund for each and every employee performing work within the scope of and/or covered by this collective bargaining agreement, whether such employee is a regular, probationary, temporary or casual employee, irrespective of his status as a member or non-member of the Local Union, from the first hour of employment subject to this collective bargaining agreement as follows:

For each hour or portion thereof, figured to the nearest quarter hour for which an employee receives pay or for which pay is due the Employer shall make a contribution of $1.10 to the New England Teamsters and Trucking Industry Pension Fund but not more than $44.00 per week for any one employee from the first hour of employment in such week.

Commencing with the 1st day of July, 1985 the said hourly contribution rate shall be $1.20 but not more than $48.00 per week for any one employee and,

Commencing with the 1st day of July, 1986 the said hourly contribution rate shall be $1.30 but not more than $52.00 per week for any one employee.

Commencing with the 1st day of July, 1984 and for the duration of the current collective bargaining agreement and any renewals or extensions thereof, the Employer

agrees to make payments to the New England Teamsters and Trucking Industry Pension Fund as follows:

For purposes of this section, each hour for which wages are paid or due, or any portion thereof, figured to the nearest quarter hour, as well as hours of paid vacation, paid holidays and other hours for which pay is due or received by the employee, shall be counted as hours for which contributions are payable. In computing the maximum amount due any week, there shall be no daily limit on the number of hours for any one day in such week, whether such hours are performed on straight time or overtime rates, but payments shall be made at the amount set forth above.

In the case of employees paid on a mileage basis, the number of hours of contribution to the Pension Fund shall be determined by dividing that employee's gross earnings for the week by the current hourly rate. Gross earnings shall include any other hours paid for, such as waiting time, breakdown time, pick-up and drop-off time, subject to the maximum weekly amount of contributions set forth above, not to exceed forty (40) hours per week per employee.

If a regular employee (as defined in the collective bargaining agreement) is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks for forty (40) hours per week. If an employee is injured on the job, the Employer shall continue to pay the required contributions at the rate of forty (40) hours for each such week until the employee returns to work; however, such contributions of forty (40) hours shall not be paid for a period of more than twelve (12) months.

(c) The Employer agrees to and has executed a copy of the New England Teamsters and Trucking Industry Pension Fund Agreement and Declaration of Trust dated April 11, 1958, and accepts such Agreement and Declaration of Trust, as amended, and ratifies the selection of the Employer Trustees now or hereafter serving as such, and all action heretofore or hereafter taken by them within the scope of their authority under such Agreement and Declaration of Trust.

(d) The parties agree that the Pension Plan adopted by the Trustees of the New England Teamsters and Trucking Industry Pension Fund shall at all times conform to the requirements of the Internal Revenue Code so as to enable the Employer at all times to treat its contributions made to the Fund as a deduction for income tax purposes.

(e) It is also agreed that all contributions shall he made at such time and in such manner as the Trustees shall reasonably require; and the Trustees shall have the authority to have an audit of the payroll and wage records of the Employer for all employees performing work within the scope and/or covered by this collective bargaining agreement for the purpose of determining the accuracy of contributions to the Pension Fund and adherence to the requirements of this Section of the collective bargaining agreement regarding coverage and contributions, such audit may, at the option of the Trustees, be conducted by an independent certified public accountant or a certified public accountant employed by the New England Teamsters and Trucking Industry Pension Fund.

If the Employer shall fail to make contributions to the Pension Fund by the twentieth (20th) day of the month

following the month during which the employees performed work or received pay or were due pay within the scope of this collective bargaining agreement, up to and including the last completed payroll period in the month for which contributions must be paid, or if the Employer, having been notified that its contributions to the Fund have been under reported and/or underpaid, fails within twenty (20) days after such notification to make any required self-audit and/or contributions found to be due, the Local Union shall have the right after an appropriate 72-hour notice to the Employer, to take whatever steps it deems necessary to secure compliance with this Agreement, any provision of this collective bargaining agreement to the contrary notwithstanding, and the Employer shall be responsible to the employees for losses resulting therefrom. Also, the Employer shall be liable to the Trustees for all costs of collecting the payments due together with attorneys' fees and such interest, liquidated damages or penalties which the Trustees may assess or establish in their discretion. The Employer's liability for payment hereunder shall not be subject to the grievance procedure and/or arbitration if such is provided in this Agreement.

It is understood and agreed that once a payment or payments are referred to an attorney for collection by the Trustees of the New England Teamsters and Trucking Industry Pension Fund and/or the Local Union, the Local Union and its business agents or chief executive officer shall have no right to modify, reduce or forgive the Employer with respect to its liability for, unpaid contributions, interest, liquidated damages or penalty as may be established or assessed by the Trustees in their discretion against delinquent Employers.

There shall he no deduction for equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-driver compensations.

Contributions to the Pension Fund must he made for each week on each regular or extra employee, even though such employee may work only part time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and, although contributions may be made for those weeks into some other Pension Fund.

(f) No oral or written modification of this section regarding pensions and retirement shall be made by the Local Union or the Employer and, if made, such modification shall not be binding upon the employees performing work within the scope of this collective bargaining agreement and covered by this section or upon the Trustees of the New England Teamsters and Trucking Industry Pension Fund.

(g) All Employers contributing hereunder shall post each month at each terminal or other place of business where employees have easy access thereto an exact copy of the remittance report form of contributions sent to the Fund.

(h) Whenever an Employer signatory to this Agreement becomes delinquent in contributions owed to the Pension Fund and the Local Union serves a 72-hour notice of delinquency set forth in this Agreement, such Employer after satisfying the delinquency and becoming current, and then during the term of this Agreement becomes delinquent again, shall be required to post a performance bond to

satisfy that second delinquency and/or any further delinquencies during the term of this Agreement.

ARTICLE XXXVI
HEALTH AND WELFARE FUND

(a) Commencing with the 1st day of August, 1984 and for the duration of the current collective bargaining agreement and any renewals or extensionS thereof, the Employer agrees to make payments to the respective Health and Welfare Funds for each and every employee performing work within the scope of and/or covered by this collective bargaining agreement, whether such employee is a regular, probationary, temporary or casual employee, irrespective of his status as a member or non-member of the Local Union from the first hour of employment subject to this collective bargaining agreement as follows:

(b) Commencing with the 1st day of August, 1984
the Employer shall contribute to the respective Health and Welfare Funds the sum of $1.66 1/4 per hour figured to the nearest quarter hour for which an employee covered by this Agreement receives pay up to a maximum of forty (40) hours but not more than $66.50 per week for any one employee.

Commencing with the 1st day of July, 1985
the Employer shall contribute to the respective Health and Welfare Funds the sum of $1.71 1/4 per hour figured to the nearest quarter hour for which an employee covered by this Agreement receives pay up to a maximum of forty (40) hours but not more than $68.50 per week for any one employee.

Commencing with the 1st day of July, 1986 the Employer shall contribute to the respective health and Welfare Funds the sum of $1.76 1/4 per hour figured to the nearest quarter hour for which an employee covered by this Agreement receives pay up to a maximum of forty (40) hours but not more than $70.50 per week for any one employee.

Commencing with the 1st day of August, 1984 and for the duration of the current collective bargaining agreement and any renewals or extensions thereof, the Employer agrees to make payments to the respective Health and Welfare Funds as follows:

For purposes of this Article, each hour paid for or any portion thereof, figured to the nearest quarter hour, as well as hours of paid vacation, paid holidays and other hours for which pay is received by the employee shall be counted as hours for which contributions are payable.

If a regular employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contribution of 32 hours for a period of four (4) weeks. If a regular employee is injured on the job the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions of 32 hours shall not be paid for a period of more than twelve (12) months.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and

regardless of the manner of computation of owner-driver compensation.

Hourly contributions to the Health and Welfare Fund must be made for each hour worked on each regular or extra employee, even though such employee may work only part time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

In the case of employees paid on a mileage basis, the numbers of hours of contribution to the Health and Welfare Fund shall be determined by dividing that employee's gross earnings for the week by the current hourly rate. Gross earnings shall include any other hours paid for, such as waiting time, breakdown time, pick-up and drop-off time, subject to the maximum weekly amount of contributions set forth above, not to exceed forty (40) hours per week per employee.

All contributions shall he made at such time and in such manner as the Trustees require, and the Trustees shall have the authority to have an independent Certified Public Accountant audit the payroll and wage records of the Employer for the purpose of determining the accuracy of contributions to the Welfare Fund.

If an Employer fails to make contributions to the Welfare Fund within 72 hours after the notice of delinquency set forth in this Agreement, the Local Union shall take whatever steps are necessary to secure compliance with this Article, any provisions of this Agreement to the contrary

notwithstanding, and the Employer shall be liable for all costs for collecting the payments due together with attorneys' fees and such penalties which may be assessed by the Trustees.

The Employers' liability for payment hereunder shall not be subject to the Grievance Procedure or arbitration provided under this Agreement.

(c) The Employers and Union which are signators hereto ratify the designation of the Employer and the Employee Trustees under such Agreement, and ratify all action already taken, or to be taken by such Trustees within the scope of their authority.

(d) All Employers contributing hereunder shall post each month at each terminal or other place of business where employees have easy access thereto an exact copy of the remittance report form of contributions sent to the Fund.

(e) Whenever an Employer signatory to this Agreement becomes delinquent in contributions owed to the Health and Welfare Fund and the Local Union serves a 72-hour notice of delinquency set forth in this Agreement, such Employer after satisfying the delinquency and becoming current, and then during the term of this Agreement becomes delinquent again, shall be required to post a performance bond to satisfy that second delinquency and/or any further delinquencies during the term of this Agreement.

ARTICLE XXXVII
NON-DISCRIMINATION

(a) The Employer and the union agree not to discriminate against any individual with respect to hiring, compensation, and other terms and conditions of employment because of such individual's race, color, religion, sex, national origin or age (between the years of 40 and 70) nor will they limit, segregate or classify employees in any way to deprive any individual employment opportunities because of race, color, religion, sex, national origin or age (between the years of 40 and 70).

(b) Whenever any words are used in this Agreement in the masculine gender, they shall he construed as though they were also used in the feminine gender.

ARTICLE XXXVIII
DURATION, TERMINATION, MODIFICATION

This agreement shall be in full force and effect from 12:01 AM July 1, 1984 until 12:01 AM, July 1, 1987, except as otherwise provided herein, and shall remain in full force and effect from year to year thereafter unless either the union or employer gives notice in writing, one to the other, of a desire to terminate or modify the Agreement, such written notice to be presented one to the other at least sixty (60) days prior to the date of expiration of this Agreement. If changes or amendments are desired, written notice containing a list of changes or amendments shall be sent, one party to the other, at least thirty (30) days prior to the date of the expiration of this Agreement. During such period conference shall be held to discuss modification or

termination of the Agreement and there shall be no cessation of work during such conference.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals by their authorized officers and representatives this _____ day of _____ , 1986.

For the Union:

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: _____

Date Signed: ___

By: _____

Date Signed: ___

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 82 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: _____

Date Signed: ___

For the Employer:

Everett Industries, Inc.
62 Everett Street
Westwood, MA 02090
(Divisions 00 & 06)

By: _____

Date Signed: ___

By: _____

Date Signed: ___

By: _____

Date Signed: ___

termination of the Agreement and there shall be no cessation of work during such conference.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals by their authorized officers and representatives this _____ day of _____ , 1986.

For the Union:

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: /s/ William J. McCarthy

Date Signed: 11-1-84

By: /s/ Ernest C.

Date Signed: 11-1-84

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 82 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: /s/_____

Date Signed: 11-1-84

For the Employer:

Everett Industries, Inc.
62 Everett Street
Westwood, MA 02090
(Divisions 00 & 06)

By: /s/ Robert Iantosca

Date Signed: 11-1-84

AGREEMENT

BY AND BETWEEN

EVERETT INDUSTRIES, INC.
(DIVISIONS 00 and 06)

AND

TEAMSTERS LOCAL UNION NOS. 25 & 82
affiliated with the

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

For The Period

JULY 01, 1987 to JUNE 30, 1990

Agreement

This Agreement is made and entered into this 1st day of July, 1987, between Everett Industries, Inc. (Divisions 00 & 06), 62 Everett Street, Westwood, MA 02090, hereinafter referred to as the "Employer," and Teamsters Local Union Nos. 25 & 82, affiliated with the International Brotherhood of Teamsters, Chauffeurs) Warehousemen and Helpers of America, hereinafter referred to as the "Union."

Preamble

The parties hereto agree that in the interest of harmony and cooperation, and in consideration of their mutual interest to promote the well being of the employees and the employer, that this Agreement shall govern the hours, wages and working conditions of the employees in the classifications covered in this Agreement.

Scope of Agreement

All operations and work covered herein shall be performed exclusively by employees covered by the Agreement.

(a) This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event the entire operation is sold, leased, transferred, or taken over by sale, transfer, lease or assignment, receivership, bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. It is understood by this section

that the parties hereto shall not use any leasing device to a third party to evade this Agreement.

The Employer shall give notice of the existence of this Agreement to any transferee, purchaser, lessee, assignee, etc. of the operation covered by this Agreement. Such notice shall be in writing with a copy to the Union not less than thirty (30) days prior to the effective date of sale or transfer.

Article 1.0 Recognition

1.1 The Employer recognizes the Union as the exclusive representative of the employees in the classification set forth below the purpose of collective bargaining with respect to wages, hours, and conditions of employment.

At Squantum Facility:

General Warehouse Worker	Furniture Cabinet Makers
Incinerator Attendant	Furniture Cabinet Finishers
Porter	Major Appliance Repair Person
Merchandise Processor	Major Appliance Repair Person (Apprenticeship)
Working Lead	

Maintenance:

Maintenance Mechanic (Licensed)
Maintenance Mechanic A
Maintenance Mechanic B

Article 2.0 Union Security and Check Off

2.1 All employees who are members of the Union as of the effective date of this Agreement or on the date of the execution of this Agreement, whichever is later, shall remain members of the Union in good standing as a condition of employment. All employees who are hired after the date of the execution of this Agreement shall become and remain members in good standing of the Union as a condition of employment on and after the thirty-first day following the beginning of their employment or on and after the thirty-first day following the execution of this Agreement, whichever is later. The failure of any person to become and remain a member of the Union after required time shall obligate the Employer, upon written notice from the Union to such effect, and to the further effect that Union membership was available to such person on the same terms and conditions generally available to other members, and that such member has failed to tender the uniform dues and initiation fees required as a condition for the acquisition or retention of membership in the Union, shall obligate the Employer to discharge such person in five (5) working days after receiving such written notice.

2.2 The Employer agrees to deduct from the pay of all employees covered by this Agreement the dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws require written authorization by the employee, the same is to be furnished in the form required. No deduction shall be made which is prohibited by applicable law. Where an employee who is on check-off is not on the payroll during

the week in which the deduction is to be made or has no earnings or insufficient earnings during that week or is on a leave of absence, the employee must make arrangements with the Local Union to pay such dues in advance.

2.3 The Employer agrees to deduct certain specified amounts each week from the wages of those regular employees who shall have given the employer written authorization to make such deductions. The amounts deducted shall be remitted to the Teamsters Local 25 Federal Credit Union, 548 Main Street, Charlestown, MA 02129, once a week. The Employer shall not make deductions and shall not be responsible for remittance to the Credit Union for any deductions for those weeks during which the regular employee has no earnings or in those weeks in which the regular employee's earnings shall be less than the amount authorized for deduction.

2.4 The Employer will recognize authorization for deduction from wages, if in compliance with State law, to be transmitted to the Local Union or to such other organizations as the Union may request if mutually agreed to, except DRIVE deductions which shall be made annually. No such authorization shall be recognized if in violation of State or Federal law. No deductions shall be made which are prohibited by applicable law.

Article 3.0 Shop Stewards

3.1 The Employer recognizes the right for the Union to designate shop stewards and alternates from among the regular employees in the bargaining units set forth in this Agreement.

3.2 The authority of the shop stewards and the alternates so designated by the Union shall be limited to, and shall not exceed, the following duties and activities:

3.2.1 The investigation and presentation of grievances in accordance with the provisions of the Collective Bargaining Agreement;

3.2.2 The collection of dues when authorized by appropriate local union action;

3.2.3 The transmission of such messages and information which shall originate with, and are authorized by, the local union or its officers, provided such messages and information

3.2.3.1 have been reduced to writing; or,

3.2.3.2 if not reduced to writing, are of routine nature, do not involve work stoppages, slowdowns, refusal to handle goods, and do not interfere with the Customer's business.

3.3 Shop stewards and alternates have no authority to take strike action or any other action interrupting the Customer's business.

3.4 The steward may request relief from his/her duties at any time to investigate and settle grievances and to present them to management. His/her supervisor will grant such relief promptly except when doing so might unduly interrupt operations or when the privilege is being abused.

3.5 The stewards will be paid at their regular straight-time hourly rate for time lost from work while attending grievance meetings. The company reserves the right to discontinue the policy of paying for time lost if, in the opinion of the company, the time spent in presentation of grievance is being abused.

3.6 Except as provided herein the steward shall be expected to carry out the work duties assigned to him/her by management.

Article 4.0 Leave of Absence

4.1 Leave of absence without pay may, in the discretion of the Employer, be granted to regular employees for a period up to three (3) weeks, which may be extended for a like period of up to three (3) weeks in the discretion of the Employer. Union officials shall, upon written application by the Union and the regular employee, be given leave of absence in writing without pay up to three (3) weeks in each calendar year for the purpose of attending a Union convention, conference or Union Executive Board meeting. No regular employees may engage in other employment during such leave. Failure to return on the first workday following the expiration of such leave or engaging in other employment during such leave or obtaining a leave under false pretenses may be cause for dismissal

Article 5.0 Seniority

5.1 Seniority for the purposes set forth in this Article shall be as follows:

5.1.1 All employees who start to work during a calendar year (in classifications "1." thru "6.") shall be considered casual employees. They shall have no seniority for the purpose of this article, provided, however, that upon completion of the probationary period (sixty (60) consecutive scheduled working days) and continuance of employment, seniority shall revert back to the first day of work in the bargaining unit. New established rates for classifications "3." and "4." on Schedule A shall be effective as of July 1, 1987. Casual employees may be discharged for any reason during the probationary period without recourse to the grievance procedure.

5.1.2 An employee's seniority standing in a job classification will be determined by his/her bargaining unit service after he/she has completed sixty (60) working days during the calendar year in the said classifications "1." thru "6.". A mechanic's seniority will commence on the day he/she goes on a list as a mechanic or apprentice. An employees classification seniority as so established shall continue in effect in any classification as long as he/she is continuously employed, or on an approved leave of absence, or on a lay off not longer than twelve (12) months. Bargaining unit seniority shall commence on the original date of employment in the bargaining unit and shall continue in effect as long as the employee is employed in the bargaining unit or on an approved leave of absence.

5.2 It is agreed that the regular employees covered by the Agreement shall be divided into six (6) seniority groups:

5.2.1 General Warehouse Worker - Squantum

5.2.2 Maintenance:

Maintenance Mechanic (Licensed)
Maintenance Mechanic A
Maintenance Mechanic B
Maintenance Mechanic (Apprentice)

5.2.3 Incinerator Attendants Porters

5.2.4 Processors

5.2.5 Furniture Cabinet Makers
Furniture Cabinet Finishers

5.2.6 Major Appliance Repair Person
Major Appliance Repair Person
(Apprentice)

5.3 It is agreed that the regular (Seniority Groups (Processing Area South Building) - Local Union 25) covered by the Agreement shall be divided into four (4) seniority-groups:

5.3.1 General Warehouse Worker - Squantum

5.3.2 Maintenance:

Maintenance Mechanic (Licensed)
Maintenance Mechanic A
Maintenance Mechanic B
Maintenance Mechanic (Apprentice)

5.3.3 Incinerator Attendants/Porters

5.3.4 Processors

5.4 It is agreed that the regular employees (Seniority Groups (High Bay Area North Building) - Local Union 82) covered by this Agreement shall be divided into four (4) seniority groups:

5.4.1 Shippers; Credit Writers; Receiver; General Warehouse Workers; Stockmen/ Operator's Mech (Hand Devices); Set Up Person

5.4.2 Merchandise Processor (Wrapper - Packer - Marker)
Classification Group 4 on Schedule A

5.4.3 Furniture Cabinet Finisher A
Furniture Cabinet Finisher B
Cabinet Maker A
Classification Group 5 on Schedule A

5.4.4 Major Appliance Repairman
Classification Group 6 on Schedule A

5.5 When it becomes necessary to lay off regular employees (Processing Area South Building) due to a reduction in the working force, those regular employees shall be laid off in the following manner:

5.5.1 The regular employee with the least classification seniority in a classification which is to have a layoff shall be displaced first.

5.5.2 Within Seniority Group 2, Maintenance Mechanics, layoff by classification seniority means that if there is to be a layoff in the classification Maintenance Mechanic (Licensed) then the junior person on the Maintenance Mechanic (Licensed) list will be laid off. Similarly, if there is to be a layoff in the classification Maintenance Mechanic A, then the junior person on the Maintenance Mechanic B, and the Maintenance Mechanic (Apprentice) classifications.

5.5.3 Within Seniority Group 3, if there is to be a layoff of Incinerator Attendants/Porters the least senior person will be laid off first.

5.5.4 Those regular employees in Seniority Group 1, General Warehouse Workers, may exercise their classification seniority within Group 1. Those regular employees in Seniority Groups 1, 2, 3 and 4 will exercise such Seniority only within their own seniority group.

5.5.5 The aforementioned notwithstanding, shop stewards, for purposes of this section only, shall have super seniority.

5.6. When it becomes necessary to lay off regular employees (High Bay Area North Building) due to a reduction in the working force, those regular employees in each seniority group separately shall be laid off in the following manner:

5.6.1 The regular employee with the least classification seniority in a classification which is to have a layoff shall be displaced first.

5.6.2 Such displaced regular employee shall then have the right to return to the classification only in his/her present group in which he/she was employed immediately prior to his/her assignment to his/her present classification and there displace the regular employee with the least seniority in the classification provided he/she is qualified to perform the work. The regular employee in the classification who is thus displaced may similarly displace regular employee in the classification in which he/she was employed immediately prior to being assigned to his/her present classification. Any such regular employee who is displaced who has not established classification seniority in any classification in his/her present group other than the one in which presently working may displace the regular employee with the least bargaining unit seniority in the lowest classification in the group, provided the bargaining unit seniority of the regular employee being displaced is less than the regular displacing he/she, and, provided, further, that the regular employee displacing is qualified to perform the work. If such regular, employee does not have greater bargaining unit seniority than another regular employee in the lowest classification, or is not qualified to do the work, he/she may displace regular employee in the next higher classification who hasless bargaining unit seniority, provided, he/she is qualified to perform the work. Such regular employee shall follow this procedure with respect to succeedingly higher classifications in his/her present group until

he/she finds regular employee with less bargaining unit seniority and provided he/she is qualified to perform the job on which he/she seeks to bump.

5.6.3 Those regular employees in Seniority Groups 1, 2 and 3 shall follow the above procedure within their respective group except after exhausting said rights in that group, they may on the same basis as set forth above displace the regular employee with the bargaining unit seniority in the lowest classification in the other group.

5.6.4 Regular employees in Seniority Group 4 will exercise their seniority rights only within Group 4.

5.6.5 The aforementioned notwithstanding, shop stewards, for purposes of this section only, shall have super seniority.

5.7 Recall Following a Layoff:

5.7.1 In the case of recall following a layoff, regular employees shall be recalled in the inverse order in which they were laid off in their classification.

5.7.2 The Employer shall notify laid-off regular employees to return to work by its customary methods, for example, telephone or other personal notification but, in any event, also by registered request, with a copy of such notification to the Union at the regular employee's mailing address of record with the Employer. Except for those regular employees laid off for thirty (30) days or less who shall report forthwith upon notification, the regular

employees so notified shall return to work within a period of five (5) days after receipt of said registered mail notice from the Employer. If such regular employee fails to signify to the Employer an intention to return to work within two (2) days after the receipt of such notice, a regular employee shall lose all seniority standing and shall no longer be considered a regular employee. It is the responsibility of the regular employee to keep his or her record current both as to telephone number and mailing address. Should he or she fail to do so, the Employer is discharged from responsibility to make further attempts to recall the regular employees until such time as records are brought up to date.

5.8 General Openings

5.8.1 Whenever an opening occurs in any job classification, except in the case of recall following a layoff as provided in Sections 5 and 6 above, and the Company determines that there is need for continuing the job, or when the Company determines that more regular employees are needed on a job, or when a new classification is added, said openings shall be posted on bulletin boards designated for such purpose for bid as provided herein for a period of three (3) working days. Regular employees shall have the opportunity for bidding for such vacant jobs and shall do so by signing the notice of vacancy where posted. The posting shall list the job vacancy, job requirement and rate of pay. The Company shall have a period of one (1) working day after the expiration of the posting period in which to consider the seniority and qualifications of the bidders. The

regular employees with the greatest bargaining unit seniority bidding for the job who is qualified shall be awarded the job pursuant to his bid therefore. A regular employee who establishes classification seniority and then bids on another job does not lose his classification seniority in his prior group classification until he establishes seniority in another classification. In the event none of the regular employees submitting bids is qualified, or if there are no bids, then the Company may fill the position with a new employee. While the job is open for bid and until such time as the vacancy is filled, there shall be no restriction on the Company's right to fill the vacancy on a temporary basis by assignment of employees.

5.8.2 Regular employees who bid into the Porter's classification will have seniority in the classification for layoff and recall purposes only from the date they go into the Porter's classification. They shall retain the seniority which they had immediately prior to entering the Porter's classification for all other purposes.

5.9 Transfers

5.9.1 Regular employees may be temporarily transferred from one job classification to another by the Employer provided that such transfer does not exceed thirty (30) calendar days at any one time. The qualified regular employee with the least amount of bargaining unit seniority will be required to perform the temporary assignment unless a more senior qualified regular employee voluntarily accepts the

assignment. Regular employees shall be permanently transferred as provided above under job vacancies.

5.10 A regular employee shall lose his seniority:

5.10.1 If he/she quits.

5.10.2 If he/she is discharged.

5.10.3 If he/she is laid off for more than twelve (12) months.

5.10.4 If he/she fails to return to work within five (5) days from the date of receiving registered mail notice to return to work or fails to notify the Company of his/her intention to return within two (2) days, except for those regular employees laid off for thirty (30) days or less who fail to report for work forthwith upon notification.

5.10.5 If he/she fails to return to work following a leave of absence upon the expiration of any sick leave.

5.10.6 If absent from work for two (2) scheduled working days without reporting his/her absence to his/her supervisor.

5.11 A list of employees arranged in the order of seniority in the particular seniority group and showing the date of bargaining unit and classification seniority shall be posted in the Fleet Maintenance Building for Maintenance employees, the West Entrance for North Building Employees and the South Entrance Corridor for all other

regular employees, not later than January 31 and July 31 of each calendar year and a copy delivered to the Union. Any controversy over the seniority standing of any regular employee on the seniority list shall be submitted to the grievance procedure within fifteen (15) days after such posting or in the case of those on layoff at the time of posting within fifteen (15) days after their return to work.

5.12 If the Employer transfers operations covered by this Agreement to a new location within the territorial jurisdiction of Locals 25 and 82, the Employer shall transfer employees from the former location to the new location as needed, provided that when there are fewer jobs at the new location than existed at the former location, the Employer shall offer the opportunity to transfer to the new location to regular employees performing the said operations at the former location, provided an opening exists and in accordance with the abilities and qualifications of those desiring to transfer and provided that where abilities and qualifications are approximately equal, seniority shall prevail.

5.13 If the Employer closes facilities covered by this Agreement and does not transfer the operations to another facility within the territorial jurisdiction of Locals 25 and 82, the Employers shall notify and discuss with the Union the question of transfer of regular employees who perform such operations to other locations.

Article 6.0 Maintenance of Standards

6.1 Nothing in this Agreement shall be interpreted as to diminish or eliminate any privilege which regular employees now enjoy. The Employer, however, reserves the

right to discontinue or diminish any privilege provided the Employer in so doing shall not discriminate against regular employees covered by this Agreement.

6.1.1 This provision does not give the Employer the right to impose or continue wages, hours and working conditions less than those contained in this Agreement.

6.2 The Employer agrees not to enter into any agreement or contract with his/her employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such Agreement shall be null and void.

6.3 If a new classification is established by the Company which is within the jurisdiction of the Union set forth in the Recognition clause of this Agreement, or a modification of an existing classification which substantially changes the job content the company shall meet with the Union representative to establish the rate applicable thereto. If no agreement is reached within ten (10) days after the first meeting, then the Company may introduce the modified or new classification and the Union may take the matter to arbitration. If the arbitrator determines that a rate higher than that set by the company is appropriate, the difference shall be paid to the regular employees involved retroactive to the original date of introduction of the new or modified classification and rate.

6.4 The company will pay up to a maximum of Eighty ($80.00) Dollars in each contract year for tool allowance pursuant to established procedures for regular employees.

Article 7.0 Grievance and Arbitration Procedure

7.1 The Steward as described in Article 3.0 shall follow specific grievance procedure as outlined in this Article. Grievances relative to interpretation or application of the terms of this Agreement shall be presented in writing to the Employer within seven (7) calendar days or one (1) calendar week after the occurrence. Any grievance not presented in the above manner will be considered null and void. The Company agrees to submit its answer within four (4) calendar days from the reception of the grievance.

7.2 If the parties cannot reach agreement relative to the disposition of the presented grievance, then the Business Agent and the Company representative will attempt to adjust the difference as promptly as possible, but no later than fifteen (15) calendar days from the original presentation of grievance.

7.3 If the parties to this agreement cannot reach settlement of the alleged violation as presented, then the dispute shall be submitted to the New England Joint Area Committee. Expenses involved shall be shared equally by the Employer and the Union, and the decision shall be binding on both parties. If a case is deadlocked at the New England Joint Area level, it shall be submitted to an impartial umpire for handling. The two parties shall agree on such umpire.

> 7.3.1 Hearing shall be held within ten (10) days thereafter. The decision of the umpire shall be final and binding. The fees and costs of the umpire shall be divided equally between the Employer and the Union involved.

7.4 Failure of the Joint Area Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure at any state, or failure to comply with final decision withdraws the benefit of this Article.

7.5 The procedures set forth herein maybe invoked only by the authorized Union representative or the Employer.

Article 8.0 Discharge or Suspension

8.1 The Employer shall not discharge nor suspend any regular employee without just cause. In all cases involving the discharge or suspension of a regular employee, the company must notify the regular employee in writing of his discharge or suspension and the reason therefore within two (2) working days from the time of discharge or suspension. Such written notice shall also be given to the shop steward and a copy mailed to the Local Union office within two (2) working days from the time of the discharge or suspension.

8.2 In respect to discharge or suspension but except in cases of serious misconduct, such as but not limited to drunkenness, dishonesty, smoking in unauthorized work areas, drug abuse, theft or assault, the Employer must give at least one warning notice of the specific complaint against such regular employee in writing, and a copy of the same to the Union and the shop steward. When written disciplinary action is taken against any regular employee, the Union Business Agent and the regular employee shall be furnished a copy thereof within seventy-two (72) hours. The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the

date of the occurrence upon which the complaint and warning notice are based.

8.3 A discharged or suspended regular employee must advise his Local Union in writing, within two (2) working days after receiving notification of such action against his/her, of his/her desire to appeal the discharge or suspension. Notice of appeal from discharge or suspension must be made to the Employer in writing within five (5) days from the date of discharge or suspension. At this point, the matter may be presented in conformance with Step 2 of the grievance procedure.

Article 9.0 Management

9.1 Except as otherwise expressly provided in this Agreement, the direction of the working forces including but not limited to, the right to hire, to discipline or discharge for just cause, to assign employees to jobs, to transfer employees within the facilities, to increase and decrease the working force, the schedules and methods or processes to be used in connection therewith, and the determination of the hourly, daily and weekly schedules of employment are vested exclusively in the Employer.

9.2 The Employer has the sole right to run its business, and without limiting the generality of the foregoing, and except as may be otherwise specifically provided in this Agreement, it is up to the Employer to decide, for example, how many facilities it will have, where they will be located, what operations will be performed therein, what equipment will be used, what work is to be done, and when it is to be done, who will do it, the extent to which it may have things

done by other companies or individuals, and how operations will be scheduled.

Article 10.0 Picket Lines

10.1 It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event a regular employee refused to enter upon any property involved in a primary labor dispute, or refused to go through or work behind any primary picket line, including the primary picket line of unions party to this agreement, and including primary picket lines at the Employer's place of business.

Article 11.0 Safety and Accidents

11.1 The Employer will comply with laws regarding safety, health, sanitation and working conditions properly required by the United States Department of Labor or any other governmental or administrative body having jurisdiction over the facilities covered by this Agreement. Any regular employee involved in any accident shall immediately report said accident and any physical injury sustained, and at the same time shall make out an accident report in writing on forms furnished by the Employer and shall turn in all available names and addresses of witnesses to the accident. Failure to comply with this provision shall subject such employee to disciplinary action by the Employer.

11.2 Employees shall immediately or at the end of their shift report all defects of equipment. Such reports shall be made on forms furnished by the Employer, one copy to be retained by the employee.

11.3 A Safety Committee shall be formed comprised of representatives of the Union and Employer at no cost to the Employer.

Article 12.0 Sanitary Conditions

12.1 The Employer agrees to maintain a clean, sanitary washroom having running water and toilet facilities. The employees agree to cooperate with the Employer in so maintaining these facilities. Employees failing to cooperate shall be subject to disciplinary action, and employees engaging in vandalism or defacement of property shall be subject to immediate dismissal.

Article 13.0 Loss or Damage

13.1 Employees shall not be required to compensate the Employer for the monetary value of the loss or damage of merchandise and/or equipment unless the loss or damage is caused by the employee's willful disregard of his responsibilities as an employee.

Article 14.0 Work Assignments

14.1 The Employer agrees not to direct or require his employees who are not in the bargaining unit to perform work customarily performed by the employees in the bargaining unit here involved.

Article 15.0 Separation from Employment

15.1 Upon discharge the Employer shall pay all money duel including vacation pay to the regular employee. Upon quitting the Employer shall pay all money due the regular

employee on the payday in the week following such quitting.

Article 16.0 Uniforms

16.1 Whenever the Employer requires any of the regular employees referred to herein to wear uniforms, such uniforms shall be furnished in good condition, dry cleaned where required, and mended by the Company. The regular employee shall use reasonable care to keep the uniform in good condition, and shall be liable for lost items.

16.2 The Employer agrees to furnish, as needed, winter jackets and raincoats to regular employees.

16.3 General warehouse workers in the dock area will be furnished with jackets and gloves for use when required by weather conditions which will be replaced when worn out and subject to rules to be established.

16.4 The Company will issue to Maintenance regular employees three (3) sets of uniforms in the Spring and three (3) sets in the Fall as required.

Article 17.0 Workers' Compensation

17.1 The Employer agrees to cooperate towards the prompt processing of employee on-the-job injury claims when such claims are due and owing as required by law.

17.2 The Employer shall continue to provide Workmen's Compensation protection as required by law.

17.3 Any employee who is injured on the job and is sent home, or goes to a hospital, or to a doctor's office shall receive pay at his/her applicable hourly rate for the balance of his/her regular shift on that day. An employee who has returned to his/her regular duties after sustaining a compensable injury who is required to receive additional medical treatment during his/her regularly scheduled working hours as a result of such compensable injury shall be paid at his/her regular hourly rate for scheduled hours worked during which he/she is absent for such purposes. The Employee shall notify his/her supervisor of the time when he/she will be absent for such purpose and the time of return. This paragraph is not intended to be applicable to absences beyond a portion of a regular workday.

Article 18.0 Examination and Identification Fees

18.1 All examinations when required by the Employer and performed under his/her direction shall be paid by the Employer. Regular employees, other than applicants, shall be paid for all time required to take all such examinations during their regular working hours.

18.2 Should the Employer find it necessary to require employees to carry or record full personal identification, such requirements shall be complied with by the employees. The cost of such personal identification shall be borne by the Employer.

Article 19.0 Military Service

19.1 The Employer will comply with the provisions of all laws of the United States and the Commonwealth of Massachusetts with reference to the re-employment rights of

those regular employees who leave the service of the Employer to serve in the Armed Forces of the United States.

19.2 A regular employee required to serve two (2) weeks military active duty shall, upon application, receive an amount by which one (1) week of his/her basic weekly salary from the employer exceeds one (1) week of his/her military pay, provided he/she has had sixty (60) days continuous service with the Company prior to the commencement of said military duty and provided said regular employee, if eligible for two (2) weeks summer vacation takes one (1) week of his/her vacation simultaneously with one (1) week of his/her military duty and the other week of his/her vacation at a time other than when he/she is on military reserve active duty.

19.2.1 Regular employees not eligible for any vacation or eligible for only one (1) week of vacation will receive the difference between one week's Company pay and one week's military pay.

19.2.2 This allowance is limited to one (1) week in each calendar year.

Article 20.0 Union Bulletin boards

20.1 The Employer agrees to provide suitable space for the Union Bulletin Board at each facility covered by this Agreement. Postings by the Union on such boards are to be confined to official business of the Union.

Article 21.0 Union Activities

21.0 There shall be no unlawful discrimination against any employee because or union membership or activities.

Article 22.0 Visits to Premises

22.1 Upon request made to the Employer, any complaint with the Employer's security regulations, authorized Union officials shall be permitted to visit the Employer's premises for the purpose of carrying out duties arising from this Agreement.

Article 23.0 Meal and Rest Periods

23.1 The Company agrees to a minimum of one-half hour meal period for the employees working in #1, #2, #3, #4, #5, and #6. All employees shall receive one 20-minute break period each day between second and third hour of work.

23.2 Any employee who leaves his/her work area for any reason whatsoever, except for lunch breaks as described above, must obtain permission or use authorized procedures.

Article 24.0 Wages

24.1 It is mutually agreed that the rates of pay shall be as in the attached Schedule A's.

Article 25.0 Work Week

25.1 Paid For Time

25.1.1 All employees covered by this Agreement shall be paid for all time spent in the service of the

Employer. Time shall be computed for the time that an employee registered in until the time he/she is effectively released from duty. If there be insufficient work in an employee's regular classification to complete a full day, the Employer may assign such employee to any work that is available and such employee shall receive no reduction in pay for such work. Employees when reassigned to another work area shall take their time card when reporting to the new area.

25.1.2 Regular employees (except casual employees) who are called in to work and who report and work as scheduled will be provided with a minimum of three (3) days of work within the work week in which they report for work or pay in lieu thereof, provided, however, this requirement shall not apply during the week in which Christmas occurs, during the week in which Thanksgiving occurs, during the week in which a personal holiday occurs, nor to those called to work on Friday, but in the latter case the exception shall only apply to the extent of ten percent (10%) of the regular (but not casual) employees in the bargaining unit.

25.2 The basic workweek shall be forty (40) hours consisting of eight (8) hours per day and five (5) consecutive days within the seven (7) days, Sunday thru Saturday, inclusive, in each calendar week, and casual employees will be paid for hours worked.

25.3 Time clocks shall be available for recording purposes and shall be located at reasonable convenient places in all buildings to which covered employees are assigned.

25.4 Posting Schedules

25.4.1 Working schedules shall be posted by the Employer.

25.4.2 In the event of a change in the regular working schedule the regular employee affected shall be notified one (1) week in advance.

25.4.3 A pay differential of ten cents (10) per hour will be paid to all regular employees who are scheduled to start work at 2:00 P.M. thru 4:00 A.M. Regular employees required to work before their regular scheduled starting time shall be paid one and one-half times their regular rate for such work provided they work their regular shift on such days.

25.5 Report Time

25.5.1 Any employee requested to and actually reporting for work as scheduled by the company shall be paid not less than his/her regular day's pay; and if he/she is on his/her scheduled day off, he/she shall be paid at the rate of time and one-half.

25.5.2 The Company will post twice each year no later than January 31 and July 31 bids for available starting times for the regular employees in the General Warehouse Worker's classification pursuant to an established procedure.

25.6 Overtime

25.6.1. Overtime shall be paid at the rate of time and one-half the regular employee's regular rate of pay for all time worked in excess of eight (8) hours in a day or in excess of forty (40) hours in a workweek, whichever total number of overtime hours, daily or weekly is greater, but not both.

25.6.2 Wherever more than one provision relating to overtime or premium pay is applicable to the same period of time worked, an overtime or premium rate will be paid only once for that period, and if different overtime or premium apply, the higher shall be paid.

25.6.3 Overtime is a required condition of employment. When overtime is necessary, the regular employees involved shall be notified. A regular employee shall not work overtime and the Company shall not pay for overtime work unless the regular employee is notified.

25.6.4 There are two (2) types of overtime, namely, Scheduled Overtime and Unscheduled Overtime. Scheduled Overtime is that work in excess of the scheduled work whereby the regular employees involved shall be notified as far in advance as possible, but at least one and one-half hours before the end of their regularly scheduled workday. Unscheduled overtime is that work in excess of the scheduled workday where, due to a need to complete present work or due to some other emergency situation, advance notification is not feasible.

25.6.5 Scheduled overtime shall be offered by seniority in each classification starting with the most

senior regular employee and assigned by starting with the least senior regular employee.

25.6.6 Unscheduled overtime shall be assigned to the regular employee(s) who is (are) performing the work for which the unscheduled overtime is necessary.

25.6.7 Any regular employee called to work before his/her regularly scheduled reporting time will not be required to take time off to compensate therefor.

25.6.8 Employees shall be granted a ten (10) minute break if required to work two (2) hours or more of overtime. In the case of scheduled or unscheduled overtime, and when there is an extension of the normal workday, such break is to be taken in the local cafeteria at the end of the normal workday.

25.7 Any employee requested to and actually reporting for work on Sunday shall be guaranteed eight (8) hours work at time and one-half.

25.8 Transfer of Individuals

25.8.1 When a regular employee is permanently transferred to another job in accordance with the provisions of this Agreement, he/she shall receive the rate of the job to which he/she is transferred, except as provided below.

25.8.2 When a regular employee is temporarily transferred from his/her regular. classification he/she shall receive the rate of this regular classification or

the rate of the job to which he/she is temporarily transferred, whichever is higher. Any overtime worked by a regular employee who has been temporarily transferred shall be paid on the basis on the rate of pay applicable during the time of such temporary transfer.

25.8.3 Upon return to his/her regular classification, the rate of pay of a regular employee shall be the same as what it would have been if he/she had continued to work in his/her regular classification.

25.8.4 There shall be no upgrading of Processors to General Warehouse when there are General Warehousemen on layoff.

25.9 Casual employees shall not enjoy seniority rights. Casual employees will not be used for the purpose of displacing regular full-time employees.

Article 26.0 Vacations

26.1 The regular employee's vacation entitlement shall be based upon the regular employee's anniversary date of employment. A regular employee who completes six (6) months continuous employment on his or her anniversary date shall be entitled to one (1) week of vacation.

26.2 A regular employee who completes one (1) year of continuous employment on his/her anniversary shall be entitled to receive (2) weeks vacation.

26.3 A regular employee who completes five (5) years of continuous service on his or her anniversary date shall be entitled to receive three (3) weeks of vacation.

26.4 A regular employee who completes ten (10) years of continuous service on his or her anniversary date of employment shall be entitled to receive four (4) weeks of vacation.

26.5 The vacation availability must be posted by the Employer thirty (30) days prior to the vacation period from January 1 to December 31, to allow regular employees in the order of their seniority to make their vacation selections. However, granting of these requests will be subject to the operational needs of the Employer.

26.6 Vacation periods are not cumulative, but each vacation is to be taken within the calendar year in which it is due.

26.7 The dollar amount of one week's vacation will be computed by dividing the individual's total earnings exclusive of allowances, as reflected on the W-2 withholding tax statement of the previous year by fifty-two (52). This computed weekly vacation amount or the individual's weekly base pay of forty (40) hours if greater will be paid for each week of vacation eligibility. All regular employees must work a minimum of twenty-five (25) days to qualify for vacation.

Article 27.0 Holidays

27.1 The following days will be considered paid holidays for regular employees:

New Year's Day
Washington's Birthday
Memorial Day
Independence Day
Labor Day
Columbus Day
Veterans' Day
Thanksgiving Day
Day After Thanksgiving
Christmas Day
Two Personal Days.

27.2 Regular employees who qualify for holiday pay shall receive their regular straight-time day's pay for the holidays listed herein. In addition, regular employees required to work on such holidays shall receive one and one-half times their regular hourly rate for such time worked.

27.3 The Personal Days holidays are to be scheduled as far in advance as possible (at least seven (7) days in advance). Permission for Personal Days are subject to the operating needs of the business and are not to be used as extensions of vacation time or holidays.

27.4 When a paid holiday falls within a paid vacation, the regular employee shall receive an additional day's pay for such holidays.

27.5 In order to qualify for holiday pay, it shall be necessary for each regular employee:

27.5.1 To have worked on the payroll for sixty (60) days immediately preceding the holiday; and,

27.5.2 To have worked the regular scheduled workday immediately preceding the holiday and the regular scheduled workday following the holiday, except in the case of an employee on layoff status for less than thirty (30) days in which case the laid off

regular employee in order to qualify for holiday pay must have worked his last regular scheduled workday immediately preceding his/her layoff and his/her first regular scheduled workday following his/her recall from layoff.

27.6 If a regular employee has been on the payroll for sixty (60) days immediately preceding the holiday and is absent from work one (1) week longer because of an illness which has been approved, he/she may qualify for holiday pay, provided:

27.6.1 The regular employee has worked the regular scheduled workday preceding the holiday, before the approved illness; and

27.6.2 The regular employee has worked the regular scheduled workday following the holiday on his/her return from an approved illness.

Article 28.0 Lie Detector Tests

28.1 The Company shall not require or request that a regular employee or applicant for employment take a polygraph or any other mechanical form of lie detector test.

Article 29.0 Funeral Leave

29.1 In the event of a death in the immediate family of a regular employee, the regular employee shall be allowed up to five (5) days off without loss of pay, including the day of burial and the two (2) days preceding the day of burial and the day following and an additional day, if the funeral takes place outside the Commonwealth of Massachusetts.

29.2 For the purpose of this Article, an regular employees immediate family shall be deemed to include only the following: Spouse, children, grandchildren, brothers, sisters, parents and the regular employee's grandparents.

29.3 In the event of the death of regular employees brother-in-law, sister-in-law, son-in-law, daughter-in-law, foster parents or parents-in-law, one (1) day off without loss of pay will be allowed.

29.4 If a regular employee is on vacation pursuant to Article 26.0 herein, but would otherwise be entitled to Funeral Leave as herein provided, he or she shall be allowed time off with pay equivalent to the Funeral Leave to which he or she was entitled but for the vacation.

29.5 The Employer may demand from the regular employee verification of the death, such as an obituary notice, and may also demand verification of the relationship between the regular employee and the deceased.

Article 30.0 Jury Duty Pay

30.1 A regular employee serving as a juror shall be paid for time spent as a juror, the difference, if any, between his or her regular straight time pay received as a juror. During the period of such jury service the regular employee is to report to work when his or her services as a juror are not required. Regular employees shall notify the Employer within forty-eight (48) hours after they receive notice to serve on a jury.

Article 31.0 No Strike or Lockout

31.1 There shall be no strikes, slowdowns, stoppages or suspensions of work by the Union or by any employees within the bargaining unit, nor lockouts by the Employer for the duration of this Agreement.

Article 32.0 Court Appearance

32.1 When a regular employee is required to appear in any court for the purpose of testifying because of any accident, he or she may have been involved in while in the Employer's service during working hours, such regular employee shall be reimbursed in full by the Employer for all straight-time earnings lost because of such appearance.

Article 33.0 Authorized Sick Time Pay

33.1 Authorized sick time will be paid when a regular employee is absent due to personal illness. Sick time pay is limited to the following:

33.1.1 Pay for the second (2nd) and third days of continuous absence due to personal illness for regular employees who have accrued ten (10) years or more of seniority.

33.1.2 Pay for the first (1st), second (2nd), and third (3rd) days of continuous absence due to personal illness for regular employees who have accrued twenty-five (25) years or more of seniority.

Article 34.0 Separability and Savings Clause

34.1 If any Article or Section of this Agreement should be held invalid by operation of law or by an tribunal of

competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

34.2 In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations upon the request of either party in writing for the purpose of arriving at a mutually satisfactory replacement for such Article or Section during the period of invalidity or restraint. If the parties do not agree on a mutually satisfactory replacement within ninety (90) days after receipt of the stated written notice, either party shall be permitted to refer the issue to the grievance procedure herein provided.

Article 35.0 Pension Fund

35.1 This Pension Article shall supersede and prevail over any other inconsistent provisions or articles contained within this agreement.

35.2.1 Commencing with the 1st day of July, 1987, and for the duration of the current collective bargaining agreement between Local Unions 25 and 82 and the Employer, and any renewals or extensions thereof, the Employer agrees to make payments to the New England Teamsters and Trucking Industry

Pension Fund for each and every employee performing work within the scope of and/or covered by this collective bargaining agreement, whether such employee is a regular, probationary, temporary or casual employee, irrespective of his status as a member or non-member of the Local Union, from the first hour of employment subject to this collective bargaining agreement as follows:

35.2.2 For each hour or portion thereof, figured to the nearest quarter hour for which an employee receives pay or for which pay is due, the Employer shall make a contribution of $1.30 to the New England Teamsters and Trucking Industry Pension Fund but not more than $58.00 per week for any one employee from the first hour of employment in such week.

35.2.3 Commencing with the 1st day of July, 1988, the said hourly contribution rate shall be $1.41 but not more than $56.40 per week for any one employee and,

35.2.4 Commencing with the 1st day of July, 1989, the said hourly contribution rate shall be $1.71 but not more than $68.40 per week for any one employee.

35.2.5 Commencing with the 1st day of July, 1987, and/for the duration of the current collective bargaining agreement and any renewals or extensions thereof, the Employer agrees to make payments to the New England Teamsters and Trucking industry Pension Fund as follows:

35.2.6 For purposes of this section, each hour for which wages are paid or due, or any portion thereof, figured to the nearest quarter hour, as well as hours of paid vacation, paid holidays and other hours for which pay is due or received by the employee, shall be counted as hours for which contributions are payable. In computing the maximum amount due any week, there shall be no daily limit on the number of hours for any one day in such week, whether such hours are performed on straight time or overtime rates, but payments shall be made at the amount set forth above.

35.2.7 In the case of employees paid on a mileage basis, the number of hours of contribution to the Pension Fund shall be determined by dividing that employee's gross earnings for the week by the current hourly rate. Gross earnings shall include any other hours paid for, such as waiting time, breakdown time, pick-up and drop-off time, subject to the maximum weekly amount of contributions set forth above, not to exceed forty (40) hours per week per employee.

35.2.8 If a regular employee (as defined in the collective bargaining agreement) is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks for forty (40) hours per week. If an employee is injured on the job, the Employer shall continue to pay the required contributions at the rate of forty (40) hours for each such week until the employee returns to work; however, such contributions of forty (40)

hours shall not be paid for a period of more than twelve-(12) months.

35.3 The Employer agrees to and has executed a copy of the New England Teamsters and Trucking Industry Pension Fund Agreement and Declaration of Trust dated April 11, 1958, and accepts such Agreement and Declaration of Trust, as amended, and ratifies the selection of the Employer Trustees now or hereafter serving as such, and all action heretofore or hereafter taken by them within the scope of their authority under such Agreement and Declaration of Trust.

35.4 The parties agree that the Pension Plan adopted by the Trustees of the New England Teamsters and Trucking Industry Pension Fund shall at all times conform to the requirements of the Internal Revenue Code so as to enable the Employer at all times to treat its contributions made to the Fund as a deduction for income tax purposes.

35.5.1 It is also agreed that all contributions shall be made at such time and in such manner as the Trustees shall reasonably require; and the Trustees shall have the authority to have an audit of the payroll and wage records of the Employer for all employees performing work within the scope and/or covered by this collective bargaining agreement for the purpose of determining the accuracy of contributions to the Pension Fund and adherence to the requirements of this Section of the collective bargaining agreement regarding coverage and contributions, such audit may, at the option of the Trustees, be conducted by an independent certified public accountant or a certified public accountant

employed by the New England Teamsters and Trucking Industry Pension Fund.

35.5.2 If the Employer shall fail to make contributions to the Pension Fund by the twentieth (20th) day of the month following the month during which the employees performed work or received pay or were due pay within the scope of this collective bargaining agreement, up to and including the last completed payroll period in the month for which contributions must be paid, or if the Employer, having been notified that its contributions to the Fund have been under reported and/or underpaid, fails within twenty (20) days after such notification to make any required self-audit and/or contributions found to be due, the Local Union shall have the right after an appropriate 72-hour notice to the Employer, to take whatever steps it deems necessary to secure compliance with this Agreement, any provision of this collective bargaining agreement to the contrary notwithstanding, and the Employer shall be responsible to the employees for losses resulting therefrom. Also, the Employer shall be liable to the Trustees for all costs of collecting the payments due together with attorneys' fees and such interest, liquidated damages or penalties which the Trustees may assess or establish in their discretion. The Employer's liability for payment hereunder shall not be subject to the grievance procedure and/or arbitration if such is provided in this Agreement.

35.5.3 It is understood and agreed that once a payment or payments are referred to an attorney for collection by the Trustees of the New England

Teamsters and Trucking Industry Pension Fund and/or the Local Union, the Local Union and its business agents or chief executive officer shall have no right to modify, reduce or forgive the Employer with respect to its liability for unpaid contributions, interest, liquidated damages or penalty as may be established or assessed by the Trustees in their discretion against delinquent Employers.

35.5.4 There shall be no deduction for equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-driver compensations.

35.5.5 Contributions to the Pension Fund must be made for each week on each regular or extra employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and, although contributions may be made for those weeks into some other Pension Fund.

35.6 No oral or written modification of this section regarding pensions and retirement shall be made by the Local Union or the Employer and, if made, such modification shall not be binding upon the employees performing work within the scope of this collective bargaining agreement and covered by this section or upon the Trustees of the New England Teamsters and Trucking Industry Pension Fund.

35.7 All Employers contributing hereunder shall post each month at each terminal or other place of business where employees have easy access thereto an exact copy of the remittance report form of contributions sent to the Fund.

35.8 Whenever an Employer signatory to this Agreement becomes delinquent in contributions owed to the Pension Fund and the Local Union serves a 72-hour-notice of delinquency set forth in this Agreement, such Employer after satisfying the delinquency and becoming current, and then during the term of this Agreement becomes delinquent again, shall be required to post a performance bond to satisfy that second delinquency and/or any further delinquencies during the term of this Agreement.

Article 36.0 Health and Welfare Fund

36.1.1 Commencing with the 1st day of July, 1987, and for the duration of the current collective bargaining agreement and any renewals or extensions thereof; the Employer agrees to make payments to the respective Health and Welfare Funds for each and every employee performing work within the scope of and/or covered by this collective bargaining agreement, whether such employee is a regular, probationary, temporary or casual employee, irrespective of his status as a member or non-member of the Local Union from the first hour of employment subject to this collective bargaining agreement as follows:

36.2.1 Commencing with the 1st day of July, 1987, the Employer shall contribute to the respective Health and Welfare Funds the sum of $1.8125 per hour

figured to the nearest quarter hour for which an employee covered by this Agreement receives pay up to a maximum of forty (40) hours but not more than $72.50 per week for any one employee.

36.2.2 Commencing with the 1st day of July, 1988, the Employer shall contribute to the respective Health and Welfare Funds the sum of NMFA per hour figured to the nearest quarter hour for which an employee covered by this Agreement receives pay up to a maximum of forty (40) hours but not more than NMFA per week for any one employee.

36.2.3 Commencing with the 1st day of July, 1989, the Employer shall contribute to the respective Health and Welfare Funds the sum of NMFA per hour figured to the nearest quarter hour for which an employee covered by this Agreement receives pay up to a maximum of forty (40) hours but not more than NMFA per week for any one employee.

36.2.4 Commencing with the 1st day of July, 1987, and for the duration of the current collective bargaining agreement and any renewals or extensions thereof, the Employer agrees to make payments to the respective Health and Welfare Funds as follows:

36.2.5 For purposes of this Article, each hour paid for or any portion thereof, figured to the nearest quarter hour, as well as hours of paid vacation, paid holidays and other hours for which pay is received by the employee shall be counted as hours for which contributions are payable.

36.2.6 If a regular employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contribution of 32 hours for a period of four (4) weeks. If a regular employee is injured on the job the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions of 32 hours shall not be paid for a period of more than twelve (12) months.

36.2.7 There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-driver compensation.

36.2.8 Hourly contributions to the Health and Welfare Fund must be made for each hour worked on each regular or extra employee, even though such employee may work only part time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

35.2.9 In the case of employees paid on a mileage basis, the numbers of hours of contribution to the Health and Welfare Fund shall be determined by dividing that employee's gross earnings for the week by the current hourly rate. Gross earnings shall include any other hours paid for, such as waiting

time, breakdown time, pick-up and drop-off time, subject to the maximum weekly amount of contributions set forth above, not to exceed forty (40) hours per week per employee.

36.2.10 All contributions shall be made at such time and in such manner as the Trustees require, and the Trustees shall have the authority to have an independent Certified Public Accountant audit the payroll and wage records of the Employer for the purpose of determining the accuracy of contributions to the Welfare Fund.

36.2.11 If an Employer fails to make contributions to the Welfare Fund within 72 hours after the notice of delinquency set forth in this Agreement, the Local Union shall take whatever steps are necessary to secure compliance with this Article, any provisions of this Agreement to the contrary notwithstanding, and the Employer shall be liable for all costs for collecting the payments due together, with attorneys' fees and such penalties which may be assessed by the Trustees.

36.2.12 The Employer's liability for payment hereunder shall not be subject to the Grievance Procedure or arbitration provided under this Agreement.

36.3 The Employers and Union which are signators hereto ratify the designation of the Employer and the Employee Trustees under such Agreement, and ratify all action already taken, or to be taken by such Trustees within the scope of their authority.

36.4 All Employers contributing hereunder shall post each month at each terminal or other place of business where employees have easy access thereto an exact copy of the remittance report form of contributions set to the Fund.

36.5 Whenever an Employer signatory to this Agreement becomes delinquent in contributions owed to the Health and Welfare Fund and the Local Union serves a 72-hour notice of delinquency set forth in this Agreement, such Employer after satisfying the delinquency and becoming current, and then during the term of this Agreement becomes delinquent again, shall be required to post a performance bond to satisfy that second delinquency and/or any further delinquencies during the term of this Agreement.

Article 37.0 Non-Discrimination

37.1 The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, and other terms and conditions of employment because of such individual's race, color, religion, sex, national origin or age (between the years of 40 and 70), nor will they limit, segregate or classify employees in any way to deprive any individual employment opportunities because of race, color, religion, sex, national origin or age (between the years of 40 and 70).

37.2 Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine gender.

Article 38. Duration, Termination, Modification

38.1 This Agreement shall be in full force and effect from 12:01 A.M. July 1, 1987, until 12:01 A.M., July 1, 1990, except as otherwise provided herein, and shall remain in full force and effect from year to year thereafter unless either the Union or Employer gives notice in writing, one to the other, of a desire to terminate or modify the Agreement, such written notice to be presented one to the other at least sixty (60) days prior to the date of expiration of this Agreement. If changes or amendments are desired, written notice containing a list of changes or amendments shall be sent, one party to the other, at least thirty (30) days prior to the date of the expiration of this Agreement. During such period conference shall be held to discuss modification or termination of the Agreement and there shall be no cessation of work during such conference.

IN WITNESS WHEREOF, the parties hereto their authorized officers and representatives 1987.

For the Union:	For the Employer:
Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America	Everett Industries, Inc. 62 Everett Street Westwood, MA 02090 (Divisions 00 & 06)
By: _____	By: _____
Date Signed: _____	Date Signed: _____

By: _____ By: _____

Date Signed: _____ Date Signed: _____

Teamsters, Chauffeurs, Warehousemen
and Helpers Union Local No. 82
affiliated with the International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America

By: _____ By: _____

Date Signed: _____ Date Signed: _____

Memorandum of Understanding

Job Security

The units herein will not be reduced below the number of employees on the Seniority Lists as of July 01, 1987, and unit employees will not be laid off during the life of this Agreement, providing work is available and employees are qualified to perform the required work.

For the Union:
Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

For the Employer:
Everett Industries, Inc.
62 Everett Street
Westwood, MA 02090
(Divisions 00 & 06)

By: _____
Date Signed: _____

By: _____
Date Signed: _____

By: _____
Date Signed: _____

By: _____
Date Signed: _____

Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 82 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By: _____
Date Signed: _____

By: _____
Date Signed: _____

Memorandum of Understanding

Overtime

Between Labor Day and Christmas, regular employees working in all Classifications (see Schedule A) will be asked on Friday to inform the Employer that they will be available to work overtime during the following week. Unit employees will first be offered said overtime unit work.

For the Union:
Teamsters, Chauffeurs,
Warehousemen and Helpers
Union Local No. 25
affiliated with the
International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America

For the Employer:
Everett Industries, Inc.
62 Everett Street
Westwood,MA 02090
(Divisions 00 & 06)

By: _____
Date Signed: _____

By: _____
Date Signed: _____

By: _____
Date Signed: _____

By: _____
Date Signed: _____

Teamsters, Chauffeurs, Warehousemen
and Helpers Union Local No. 82
affiliated with the International
Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America

By: _____
Date Signed: _____

By: _____
Date Signed: _____

jordan marsh

NORTH QUINCY, MASSACHUSETTS 02171

Mr. Robert E. Iantosca
Senior Vice President
EVERETT INDUSTRIES, INC.
62 Everett Street
Westwood, MA 02090

Dear Sir:

With respect to Everett Industries, Inc. furnishing the personnel for certain job classifications at the Jordan Marsh Distribution Facility at Squantum, Massachusetts, effective April 29, 1984, Jordan Marsh Company will and does hereby assign to Everett Industries, Inc. and Everett Industries, Inc. agrees to assume, effective April 29, 1984, the collective bargaining agreements and all obligations thereunder currently in effect between Jordan Marsh Company and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 25 and 82 covering employees at the Distribution Facility at Squantum, Massachusetts. For its part, Everett Industries, Inc. agrees to recognize the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Locals 25 and 82 as the bargaining representative of its employees employed at the Jordan Marsh Company Distribution Facility at Squantum, Massachusetts, on and after April 29, 1984, in the bargaining units set forth in the collective bargaining agreements referred to above.

Please indicate you assent to the above by signing for Everett Industries, Inc. on the line provided below.

Very truly yours,
JORDAN MARSH COMPANY

By /s/ Richard Van Pelt
Dated: 4-22-84

Assent to:
EVERETT INDUSTRIES, INC.

By /s/ Robert E. Iantosca, Sr. V.P
Dated: April 23, 1984

jordan marsh

NORTH QUINCY, MASSACHUSETTS 02171

April 27, 1984

Mr. Robert E. Iantosca
Senior Vice President
Everett Industries, Inc.
62 Everett Street
Westwood, Ma. 02090

Dear Sir:

The effective date of the attached agreement signed by Jordan Marsh Company and Everett Industries, Inc. is hereby extended to May 13, 1984.

Very truly yours,
JORDAN MARSH COMPANY

By /s/ Richard Van Pelt
Dated: 4/27/84

Assent to:
EVERETT INDUSTRIES, INC.

By /s/ Robert E. Iantosca, Sr. V.P
Dated: April 27, 1984

Massachusetts General Law, Chapter 151B

§5. Complaints; procedure; limitations; bar to proceeding; award of damages

Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A, ninety-eight and ninety-eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commissions's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the

complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that. such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of the said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probable cause finding relates. The commission, upon receipt of such notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from subsequently bringing a complaint on the same matter before the commission. If any complainant or respondent elects judicial determination as aforesaid, the commission shall authorize and not later than thirty days after the election is made the attorney general shall commence and maintain, a civil action on behalf of the complainant in the superior court for the county in which the unlawful practice occurred. Any complainant may intervene as of right in

said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine, Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that aggrieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission, or such other place as may be designated by it. Before or after a

determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such, temporary relief or restraining orders as it deems just and proper. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforesaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probable cause exists to credit the allegations of a complainant that a respondent has refused to sell, rent or lease, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresident of the commonwealth and cannot be personally served with process in the commonwealth, such investigating commissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate injunctive relief against such property

with respect to which a complaint has been made, including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings under this chapter. Such commissioner shall send by registered mail, with return receipt requested, a copy of such petition to the last address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process or within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property which has been the subject of an order or decree of the superior court. Any person renting or leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer

to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter or of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful practice or violation of said clause (e) of said section thirty-two or said sections

ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a judgment thereunder, be a bar to proceedings under this section.

If upon all the evidence at any such hearing die commission shall find that a respondent has engaged in any such unlawful practice relative to housing or real estate or violated clause (e) of said suction thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages, which damages shall include, but shall not be limited to, the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation. Any person claiming to be aggrieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of

such award, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to a housing practice it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed ten thousand dollars if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(b) in an amount not to exceed twenty-five thousand dollars if the respondent has been adjudged to have continued one other discriminatory housing practice during the five year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed fifty thousand dollars if the respondent has been adjudged to have committed two or more discriminatory housing practices during the seven year period ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the

acts constituting the discriminatory housing practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred,

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 00-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

EVERETT INDUSTRIES, INC.,
Petitioner,
v.
DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS F. REILLY
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of Massachusetts

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Boston, Massachusetts 02108
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Counsel of Record
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Massachusetts Commission
Against Discrimination

31 pp

Questions Presented

1. Whether an employee's state-law handicap discrimination claim was preempted by the federal Labor Management Relations Act, where adjudication of the employee's claim did not require interpretation of any provision of a collective bargaining agreement.

2. Whether the Massachusetts Commission Against Discrimination correctly awarded attorney's fees under a state statute that was enacted shortly after the administrative complaint was filed, where the statute simply provides the same relief in an administrative forum as would be available if the complainant had filed suit and prevailed in court.

List of Parties

All parties appear in the caption of the case on the cover page.

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No. 00-950

IN THE

Supreme Court of the United States

EVERETT INDUSTRIES, INC.,
Petitioner,

v.

DIVYABALA PATEL AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Massachusetts Commission Against Discrimination requests that this Court deny the petition for a writ of certiorari, seeking review of the Massachusetts Appeals Court's decision in this case.

Opinions and Orders Below

The order of the Supreme Judicial Court for the Commonwealth of Massachusetts denying further appellate review is reported at 432 Mass. 1109, 737 N.E.2d 468 (2000), and is reproduced in the appendix to the petition ("Pet. App.") at A-1. The opinion of the Massachusetts Appeals Court is not reported but is reproduced at Pet. App. B-4—B-21. The opinion and order of the Massachusetts Superior Court are not reported but are reproduced at Pet. App. F-1—F-18. The opinion of the full Massachusetts Commission Against Discrimination is reported at

18 MDLR 182 (Sept. 18, 1996) and is reproduced at Pet. App. I-1—I-11. The opinion of the Hearing Officer of the Massachusetts Commission Against Discrimination is reported at 18 MDLR 26 (Jan. 24, 1996) and is reproduced at Pet. App. J-1—J-15.

Jurisdiction

The Massachusetts Appeals Court issued its decision on June 29, 2000. Pet. App. B-1. The Massachusetts Supreme Judicial Court denied a timely application for further appellate review on September 8, 2000. Pet. App. A-1. On December 7, 2000, a timely petition for a writ of certiorari was filed in this Court. *But see* Presentation and Disposition of the Federal Questions Below, *infra* (contesting this Court's jurisdiction over the attorney's fees issue presented in the Petition).

Statutes Involved

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Massachusetts G.L. c. 151B, § 4(16), provides, in pertinent part:

> It shall be an unlawful practice:
>
> . . .
>
> . . . For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. . . .
>
> In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:—
>
> (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;
>
> (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and
>
> (3) the nature and cost of the accommodation needed.

> Physical or mental job qualification requirement[s] with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

Massachusetts St. 1989, c. 722, § 27, provides:

> Said second paragraph of said section 5 of said chapter 151B [of the Massachusetts General Laws], as so appearing, is hereby further amended by inserting after the twenty-third sentence the following sentence:— In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant.

The full text of Mass. G.L. c. 151B, § 5, as amended by St. 1989, c. 722, § 27, is reproduced at Pet. App. O-1—O-9.

Massachusetts G.L. c. 151B, § 9, provides, in pertinent part:

> If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust.

Statement of the Case

Prior Administrative and Judicial Proceedings

This is an action for judicial review, under the state administrative procedures act, of a decision of a state agency, the Massachusetts Commission Against Discrimination ("the Commission"). The Commission's hearing officer found that Everett Industries ("the employer") had discriminated against Divyabala Patel ("the employee") on the basis of her handicap—hand and shoulder injuries—by denying her a reasonable accommodation—temporary assignment to work not involving heavy lifting—in violation of the state anti-discrimination statute, Mass. G.L. c. 151B, § 4(16). Pet. App. J-10—J-13. The full Commission affirmed the hearing officer's decision and awarded the employee attorney's fees, pursuant to Mass. G.L. c. 151B, § 5, *as amended by* Mass. St. 1989, c. 722, § 27. Pet. App. I-1—I-11.

The employer then filed a complaint for judicial review of the Commission's decision in the Massachusetts Superior Court, pursuant to Mass. G.L. c. 30A, § 14. After the Superior Court affirmed the Commission's decision in all respects, Pet. App. F-1—F-18, the employer appealed to the Massachusetts Appeals Court, which affirmed the Superior Court's decision. Pet. App. B-4—B-21. The Massachusetts Supreme Judicial Court denied the employer's application for further appellate review. Pet. App. A-1.

Facts

Only two facts are material to the questions on which the

petitioner seeks review:[1] (1) In finding the employer liable for handicap discrimination, the hearing officer did not rely on the parties' collective bargaining agreement, which she expressly found to "contain no provisions either allowing or prohibiting changes in work assignment to reasonably accommodate employees with handicaps," Pet. App. J-8; *see also* Pet. App. K, L (the applicable collective bargaining agreements); and (2) the attorney's fees statute under which the Commission awarded fees to the employee became effective in 1990, Pet. App. I-5—I-6 n.3, after the underlying conduct in this case, Pet. App. I-8—I-10, and shortly after the employee filed her complaint with the Commission, Pet. App. J-1, but before all but 3½ hours of the legal services in question were performed.

Presentation and Disposition of the Federal Questions Below

The first question presented in the petition—whether the employee's state-law handicap discrimination claim is preempted by the federal Labor Management Relations Act ("LMRA")—was not raised before the Commission. Rather, it was raised for the first time in the Superior Court, in an amendment to the employer's complaint. Pet. App. H-2. Accordingly, as a matter of state law, it should not have been considered by the lower courts. Mass. G. L. c. 151B, § 6 ("[n]o objection that has not been urged before the commission shall be considered by the court"); *Katz v. Massachusetts Comm'n Against Discrimination*,

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[1]Although not relevant to what issues "properly would be before the Court if certiorari were granted," *cf.* Sup. Ct. R. 15(2), the employer's allegations that the employer had a practice of no light-duty assignments, Pet. at 8, and that the employee sought creation of a new light-duty position, Pet. at 10, are incorrect. *See* Pet. App. J-7, J-6 (finding to the contrary on both points and citing the relevant evidence in the record).

365 Mass. 357, 364, 312 N.E.2d 182, 186 (1974). This rule applies with equal force to jurisdictional issues. *East Chop Tennis Club v. Massachusetts Comm'n Against Discrimination*, 364 Mass. 444, 452, 305 N.E.2d 507, 513 (1973). However, in this case, the Superior Court and the Appeals Court nevertheless considered this claim on its merits, over the Commission's objections, based on the doctrine that jurisdictional defenses may be raised at any time.[2] Pet. App. F-9, B-8—B-9 n.8.

In rejecting the preemption claim on its merits, the Appeals Court applied the test established by this Court for determining whether section 301 of the federal LMRA preempts a state-law claim—i.e., whether adjudication of the state-law claim turns on the meaning of a provision in a collective bargaining agreement. Pet. App. B-8—B-11 (*citing Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988); *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)). Having determined that the Commission's decision did not turn on the meaning of any provision of the applicable collective bargaining agreements, the Appeals Court held that the employee's state-law claim was not preempted by the federal LMRA. *Id.*

The second question presented by this petition—whether the Commission properly gave retroactive effect to a state attorney's fees statute—was presented first at the Commission, Pet. App. I-5—I-6, and then in the Superior and Appeals Courts. Pet. App. F-15—F-16, B-18. In summarily rejecting this claim, the Appeals Court relied solely on a previous decision of the

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[2]It is doubtful that this defense was correctly characterized as jurisdictional, since even if the employee's state-law claim were preempted by the LMRA, state courts would still have jurisdiction to adjudicate the claim but would be required to apply federal labor law in doing so. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101, 103-04 (1962).

Massachusetts Supreme Judicial Court, *School Comm. of Brockton v. Massachusetts Comm'n Against Discrimination*, 423 Mass. 7, 16, 666 N.E.2d 468, 475 (1996), Pet. App. B-18, which, in turn, relied on an earlier pronouncement of the same court on that issue. *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 320-21 n.11, 613 N.E.2d 881, 889 n.11 (1993).

In the *Brockton* and *Fontaine* cases, the Supreme Judicial Court upheld the retroactive application of this attorney's fees statute on the ground that, rather than create a new substantive right or remedy, it "simply entitled complainants who pursued their cases before the commission to a remedy commensurate with the remedy to which they would have been entitled if they had filed suit and prevailed in a State or Federal court." *Brockton*, 423 Mass. at 16, 666 N.E.2d at 475 (citing *Fontaine*, 415 Mass. at 320, 613 N.E.2d at 889). In so concluding, the Supreme Judicial Court treated this issue solely as one of legislative intent, *Fontaine*, 415 Mass. at 318, 613 N.E.2d at 887 ("Whether a statute applies retrospectively is a question of legislative intent."), rather than one of federal constitutional law.[3]

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[3]Although the Appeals Court characterized the employer's objection to the attorney's fees award as based on "due process" grounds, Pet. App. B-18, in its brief to that court, the employer argued only that the state legislature did not expressly make the statute retroactive and that the Supreme Judicial Court had erred in the *Brockton* case by reading such intent into the statute, thereby overstepping the proper bounds of the judicial branch. Employer's Brief at 40-42. At most, this is a question of state constitutional law, rather than federal law. It is therefore questionable whether any substantial federal question concerning the propriety of the attorney's fees award was even presented to the Appeals Court, *cf.* 28 U.S.C. § 1257(a) (requiring that a federal right be "specially set up or claimed"), much less decided

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Cf. Landgraf v. USI Film Products, 511 U.S. 244, 272 (1994) (explaining that issue of retroactive versus prospective application of federal statutes, while originally rooted in economic due process concerns, is now largely a matter of Congressional intent). Because the state legislature's intent is a question of state law, which constitutes an independent and adequate ground for the Appeals Court's decision on the attorney's fees question, this Court lacks jurisdiction to consider that question. *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983); *Bush v. Palm Beach County Canvassing Bd.*, 69 U.S.L.W. 4020, 4021 (U.S. Dec. 4, 2000).

Reasons for Denying the Writ

I. THE APPEALS COURT'S DECISION SIMPLY APPLIES ESTABLISHED LEGAL STANDARDS TO THE FACTS OF THIS CASE.

A. The Preemption Issue Turns on the Application of a Settled Standard—Whether Adjudication of the State-Law Claim Requires Interpretation of a Collective Bargaining Agreement.

In ruling that the employee's state-law employment discrimination claim was not preempted by the federal LMRA, the Appeals Court applied the test established by this Court: whether adjudication of the state-law claim turns on the meaning of a provision in a collective bargaining agreement. Pet. App. B-8—B-11 (*citing Lingle*, 486 U.S. at 405-06; *Allis-Chalmers*, 471 U.S. at 220). Although the employer disagrees with the result the

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[3](...continued)
by that court.

Appeals Court reached, it does not dispute the correctness of the legal standard the Appeals Court applied. Indeed, in its Petition, the employer relies on the very same decisions of this Court and states the applicable standard in terms virtually identical to those the Appeals Court used. *Compare* B-9 ("The 'basic test' for determining whether § 301 preempts a state-law claim is whether a court, 'in passing upon the claim, would be required to interpret the collective bargaining agreement.' *Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 26 (1st Cir. 1997), citing to *Lingle . . . .*"), *and* Pet. at 11 ("Section 301 prempts state law claims which require interpretation of a collective bargaining agreement. *Lingle . . . .*; *Allis-Chalmers . . . .*").

Thus, the question presented by the Petition is simply whether the agreed-upon legal standard was correctly applied to the circumstances of this case—i.e., what the applicable collective bargaining agreement provided and what relationship, if any, that agreement had to the employee's state-law employment discrimination claim. As such, it is not an appropriate subject for review by this Court. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

B. The Attorney's Fees Issue Also Turns on the Application of a Settled Standard—Whether the Statute Attaches New Legal Rights, Liabilities, or Responsibilities to Events Completed Before Its Enactment.

The test used by Massachusetts courts in determining whether it is impermissible to give a state statute retroactive effect is the same as that articulated by this Court with respect to federal statutes—whether the statute attaches new legal consequences to past conduct. *Compare Fontaine*, 415 Mass. at 318-20, 613 N.E.2d at 887-88 (whether the statute creates a new legal right or liability with respect to past conduct), *and Landgraf*,

511 U.S. at 280 (whether the statute impairs preexisting rights, increases liability for past conduct, or imposes new duties with respect to completed transactions). Based on its determination that this fee statute, rather than create new rights or responsibilities, "simply entitled complainants who pursued their cases before the commission to a remedy commensurate with the remedy to which they would have been entitled if they had filed suit and prevailed in a State or Federal court," *Brockton*, 423 Mass. at 16, 666 N.E.2d at 475, *cited in* Pet. App. B-18, the Appeals Court upheld the Commission's authority to award fees under this statute, despite the fact that the statute was enacted after the underlying discriminatory conduct and after the complaint was filed at the Commission. Thus, as with the first question presented by the Petition, the second question reduces to whether the Appeals Court correctly applied this proper legal standard to the particular circumstances of this case. As such, this question is similarly unworthy of this Court's review. Sup. Ct. R. 10.

II. THERE IS NO CONFLICT BETWEEN THE CONCLUSIONS REACHED BY THE APPEALS COURT AND THOSE REACHED BY THIS COURT AND OTHER LOWER COURTS IN SIMILAR FACTUAL SITUATIONS.

Noticeably absent from the Petition is any contention that review by this Court is necessary to resolve a previously undecided important federal question or to resolve any conflicts between the Appeals Court's decision and those of the federal courts of appeals or the highest courts of other states. *Cf.* Sup. Ct. R. 10(b), (c) (listing such conflicts as among the "compelling reasons" this Court considers in determining whether to grant a petition for a writ of certiorari). To the contrary, as illustrated by the cases cited by the Appeals Court and in the Petition itself, both of the questions presented by this Petition have already been decided by this Court and by other courts in a manner entirely

consistent with the conclusions reached by the Appeals Court in this case.

A. Where, As Here, Adjudication of a State-Law Claim Does Not Require Interpretation of a Collective Bargaining Agreement, the State-Law Claim Is Not Preempted by the Federal LMRA.

The Appeals Court's ruling on the preemption issue is consistent with prior decisions of this Court and those of federal courts of appeal and other state appellate courts on this issue. In resolving this issue, the Appeals Court applied the "basic test" articulated by this Court and consistently followed by the federal courts of appeals and state appellate courts—"whether [the adjudicator], 'in passing upon the [state-law] claim would be required to interpret the collective bargaining agreement.' *Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 26 (1st Cir. 1997), citing to *Lingle v. Norge Div. of Magic Chef, Inc.*[,] 486 U.S. 399, 405-406 (1988)." Pet. App. B-9.

As recognized by the Appeals Court, "There is no indication in the hearing officer's findings that she interpreted the [collective bargaining agreements]" in adjudicating the employee's state-law employment discrimination claim. Pet. App. B-11. Rather, the hearing officer expressly found, based on testimony of the employer's own witness, that the collective bargaining agreements were silent on the relevant points: "The[] collective bargaining agreements contain no provisions either allowing or prohibiting changes in work assignment to reasonably accommodate employees with handicaps. . . . The agreements do not address transfers of employees within the same job classification to different areas of the facility or to different locations within the same area." Pet. App. J-8; *see also* Pet. App. K, L (the applicable collective bargaining agreements).

The fact that the hearing officer consulted the collective

bargaining agreements solely to satisfy herself of their irrelevance cannot, in itself, satisfy the test for LMRA preemption. Where, as in this case, "the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the [state-law] claim to be extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Rather, as recognized by the Appeals Court, "There must be a 'real interpretive dispute' to preempt state law claims." Pet. App. B-11 (quoting *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 10 (1st Cir. 1999)).

Alternatively, the employer contends that, in the absence of any relevant express provisions in the collective bargaining agreement, the Commission was required to rely on unwritten terms implied by past practice. Pet. at 15. While past practice may well guide an arbitrator in resolving disputes under a collective bargaining agreement, *cf. United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960) (practices of the shop or industry properly looked to for that purpose), such implied terms have no place in LMRA preemption analysis. The union's acceptance of terms limiting its members' statutory right to be free from discrimination would constitute a waiver of its members' state-law rights. As this Court noted in *Lingle*, such a waiver cannot be lightly inferred but, rather, requires "clear and unmistakable" evidence. 486 U.S. at 410 n.9. In this case, even if past practice were considered, it would yield no such unequivocal result, given the conflicting testimony from the employer's own witnesses as to what its past practice was concerning temporary reassignments. *Compare* J-7 (detailing "evidence that numerous employees had been granted transfers or reassigned to different departments for a variety of reasons") *and* J-9 (employer's senior vice president "testified that [employer] never provided light duty for workers who were injured on the job").

Although the hearing officer did consider evidence of the employer's past reassignment practices, she did so solely as a

means of determining whether it would have been "unreasonable or would have imposed an undue burden upon the company" to accommodate this employee's disability by permitting her to do light-duty work on a temporary basis, as would otherwise be required by state law. Pet. App. J-11. The fact that the same evidence might also be relevant in construing the provisions of a collective bargaining agreement is beside the point. "[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and a state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Lingle*, 486 U.S. at 409-10; *Livadas*, 512 U.S. at 123 (same).

Rather than require interpretation of the collective bargaining agreement, so as to warrant preemption under the test articulated by this Court, adjudication of the employee's state-law handicap discrimination claim turned exclusively on "purely factual questions," *Lingle*, 486 U.S. at 407, about the nature of her disability, her qualification to perform the essential functions of her job with a reasonable accommodation, and the feasibility of providing such an accommodation, Pet. App. J-2—J-14, I-2—I-4, F-2—F-12, B-11—B-18, the essential elements of a handicap discrimination claim under Mass. G.L. c. 151B, § 4(16).

This is therefore not a case where the state-law claims and the collective bargaining agreement are "inextricably intertwined." *Allis-Chalmers*, 471 U.S. at 213. Instead, the employee's claim here is premised solely on her independent statutory right not to be discriminated against on the basis of a disability and is therefore not preempted. *Cf. id.* at 212 ("[I]t would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract); *Lingle*, 486 U.S. at 412-13 (using state-law anti-discrimination claims as example of independent state-law claims that are not preempted by section

301); *Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 724 (1963) (finding no preemption of a state anti-discrimination statute by the federal Railway Labor Act).

The Appeals Court's ruling on the preemption issue is consistent not only with the decisions of this Court on LMRA preemption but also with those of federal courts of appeals and state courts of last resort on that issue. Like the Massachusetts Appeals Court, many federal and state appellate courts have rejected arguments that state-law handicap discrimination claims are preempted by the LMRA. *See, e.g., Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1524-28 (9th Cir. 1995); *Martin Marietta v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1399-1402 (4th Cir. 1994); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1332-35 (6th Cir.) (en banc), *cert. denied*, 493 U.S. 992 (1989); *Ackerman v. Western Elec. Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988); *Miller v. AT&T Network Systems*, 850 F.2d 543, 545-50 (9th Cir. 1988); *Bruce v. Northwest Metal Product Co.*, 79 Wash. App. 505, 512, 903 P.2d 506, 511 (Wash. App. Div. 2 1995), *review denied*, 129 Wash.2d 1014, 917 P.2d 575 (1996); *see also Evans v. Southern Pacific Transp. Co.*, 213 Cal. App.3d 1378, 1383-88, 262 Cal. Rptr. 416, 419-22 (Cal. Ct. App.), *review denied* (1989), *cert. denied*, 496 U.S. 936 (1990) (no preemption under the RLA); *Quinn v. Southern Pacific Transp. Co.*, 76 Or. App. 617, 623-24, 711 P.2d 139, 144 (Or. Ct. App. 1985), *review denied*, 300 Or. 546, 715 P.2d 93 (1986) (same).

The few courts that have reached the opposite conclusion have done so based on express links, absent here, between the state-law claims and the applicable collective bargaining agreements. For example, in *Davis v. Johnson Controls, Inc.*, 21 F.3d 866 (8th Cir.), *cert. denied*, 513 U.S. 964 (1994), the court found preemption based on the fact that, under state regulations, one factor that must be considered in determining whether an accommodation is reasonable under the state handicap discrimination law is "the authority to make the accommodation

under the terms of any *bona fide* agreement." *Id.* at 868. *Cf.* Mass. G.L. c. 151B, § 4(16); 804 C.M.R. § 3.01(5)(e) (containing no such provision). *See Martin Marietta*, 38 F.3d at 1401 (distinguishing *Davis* on that ground); *Jimeno*, 66 F.3d at 1528 (same). Similarly, in *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993) (involving the RLA rather than the LMRA and decided before *Livadas* and before this Court's clarification of the RLA preemption standard in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994)), the court found preemption based on the collective bargaining agreement's express provisions governing the method by which an employee's fitness to perform his job is determined and describing the employer's obligations to accommodate disabled employees. *O'Brien*, 972 F.2d at 5. *Cf.* Pet. App. K, L (containing no such provisions). The *O'Brien* court also relied heavily on the fact that the employee had filed a grievance under those very provisions. *Id.*

B. Where, As Here, the Newly Enacted Fee Statute Simply Authorized the Commission to Provide the Same Relief that Would Have Been Available If the Employee Had Chosen to File Her Claim in Court, the Commission Properly Applied that Statute to Award Fees in This Proceeding, Which Was Commenced Prior to the Effective Date of the Act.

The Appeals Court's decision upholding the Commission's authority to award attorney's fees to the employee in this case is entirely consistent with this Court's holdings on retroactive application of statutes in general and of attorney's fees statutes in particular. As this Court clarified in *Landgraf*, the generally applicable presumption against statutory retroactivity applies only where the newly enacted statute "would have genuinely 'retroactive' effect," 511 U.S. at 277, in the sense that

it "attaches new legal consequences to events completed before its enactment." *Id.* at 270. Where the new statute is not retroactive in that sense, "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situtations." *Id.* at 273.

Repeatedly, this Court has identified the application of newly enacted attorneys' fees statutes as among the situations in which application of new statutes to pending cases is appropriate. The first, and most general, reason that it is permissible to apply newly enacted fee statutes to already pending cases—even after those cases have been tried—is that "[a]ttorney's fee determinations . . . are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Landgraf*, 511 U.S at 277 (quoting *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978) (upholding the application of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, to pending cases on that ground)). As explained by this Court, an attorney's fees remedy "does not compensate the plaintiff for the injury that first brought him into court," *Hutto*, 437 U.S. at 695 n.24, thereby attaching new legal consequences to past conduct. "Instead, the award reimburses him for a portion of the expenses he incurred in seeking [judicial] relief." *Id.* In other words, a fee statute does "no[t] . . . change the substantive obligation of the parties," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 721 (1974)—here, to provide reasonable accommodations to disabled employees.

A second reason, stemming from the first, is that, because a fee statute does not "make unlawful conduct that was lawful when it occurred," *Landgraf*, 511 U.S. at 281-82, a party who acts unlawfully is already on notice that its conduct may subject it to monetary or other liability. It is therefore unlikely that a party will be able to show that "the obligation under [the new fee statute], if known, . . . would have caused [it] to order its [prelitigation] conduct so as to render . . . litigation unnecessary

and thereby preclude the incurring of such costs," making retroactive application of the statute inequitable. *Bradley*, 416 U.S. at 721; *cf. Landgraf*, 511 U.S. at 282 (upholding, on this ground, retroactive application of compensatory damages remedy to conduct that was already prohibited by Title VII).

In this case, the employer does not even claim that prior knowledge of its fee obligation would have altered its underlying discriminatory conduct, only its conduct in litigating this case. Pet. at 21. As to that conduct, if the employer wanted to limit his fee liability, it could have settled the case as soon as the fee statute was enacted, thereby avoiding all but $490 of the fees ultimately awarded. Pet. App. I-9 (indicating that only $490—$612.50 minus a 20 percent reduction—of the total $24,368 fee award was attributable to services performed prior to the enactment of the fee statute in 1989). At most, this argument would invalidate the application of the fee statute to the 3½ hours of services that were rendered before the statute's enactment. *Cf. Martin v. Hadix*, 527 U.S. 343, 360-62 (1999) (invalidating application of fee statute to services performed before the statute's effective date but finding "no retroactivity problem" with applying the statute to services performed after the statute's effective date).

A third rationale recognized by this Court—and the one expressly applied by the Massachusetts Supreme Judicial Court in upholding the retroactive application of the fee statute at issue here—is that, even before the Commission was authorized to award fees, fees were available to successful discrimination complainants who chose to litigate their claims in court rather than in an administrative forum.[4] *Brockton*, 423 Mass. at 16, 666

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[4]Under Mass. G.L. c. 151B, § 9, a person claiming to be the victim of illegal discrimination may, 90 days after filing a complaint with the Commission, file an action in court. "If the

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N.E.2d at 475, *cited in* Pet. App. B-18. Under similar circumstances—where fees were already available under a different legal theory—this Court upheld the application of a new fee statute to already pending actions, on the ground that the new statute "merely serves to create an additional basis or source for the [defendant]'s potential obligation to pay attorney's fees. It does not impose an additional or unforeseeable obligation upon it." *Bradley*, 416 U.S. at 721; *cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (upholding retroactive application of a statute that "affect[s] only *where* a suit may be brought, not *whether* it may be brought at all").

III. BECAUSE THE ATTORNEY'S FEES STATUTE AT ISSUE HERE IS ALREADY MORE THAN TEN YEARS OLD, THE QUESTION OF WHETHER IT SHOULD BE APPLIED TO PRE-ENACTMENT CASES IS NOT AN IMPORTANT QUESTION WORTHY OF CONSIDERATION BY THIS COURT.

A central consideration applied by this Court in determining whether to grant a petition for a writ of certiorari is whether the question presented is "important," Sup. Ct. R. 10, not merely to the parties involved but to the public at large. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). The attorney's fee question presented here cannot be deemed important in either sense.

Even as to the parties themselves, the amount at issue, which may be as little as $490, as discussed above, is certainly

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court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust." *Id.*

not large enough to render the case "important" on that ground. More to the point, the question presented—concerning the application of this statute to cases filed before its enactment in 1990, now more than ten years ago—is unlikely to be of any continuing significance to many, if any, other current litigants. For that reason as well, the Petition, at least on the attorney's fees issue, should be denied.

Conclusion

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully sumbitted,

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